Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GARY LAATSCH and LAW OFFICE OF PAVALON, GIFFORD, LAATSCH & MARINO,

Petitioners,

v.

HELEN MIHAILOVICH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The District Court may exclude relevant evidence if its probative value is outweighed by its prejudicial effect. Pursuant to Rule 403 of the Federal Rules of Civil Procedure, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. District courts are accorded wide discretion in determining the admissibility of evidence. The U.S. Court for the Seventh Circuit vacated the judgment of the U.S District Court for the Northern District of Illinois, Eastern division and remanded the case for new trial based on finding that the District court abused its discretion in excluding certain evidence. The U.S. Court of Appeals for the Seventh Circuit has departed from the accepted and usual course of judicial proceedings as to warrant review by this Honorable court to decide:

Whether the U.S. Court of Appeals for the Seventh Circuit erred in finding that the district court's exclusion of evidence of other accidents that occurred near the location of the Mihailovich accident was an abuse of discretion?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Gary Laatsch and the Law Office of Pavalon, Gifford, Laatsch & Marion, Defendants-Appellees and Helen Mihailovich; Plaintiff-Appellant.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct.R. 29.6.

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Parties to the Proceeding ii

Corporate Disclosure Statement iii

Table of Contents ..... iv-v

Table of Authorities ..... vi-vii

Petition for a Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Statement of the Case 2-6

Argument 6-21

I. District Court properly excluded other accident evidence 6-15

1. Respondent Failed to Make an Offer of Proof to Establish that the "Other-Accidents" were Substantially Similar 7-12

2. Exclusion of Details of Other Accidents that Allegedly Occurred in the Same General Area of Plaintiff's Accident did not Affect the Outcome as Plaintiff did not Proffer Admissible Evi-

dence of the Existence or Specifics of the Other Kedzie curve Accidents 13-15

II. District Court did not abuse its discretion in barring William Berg's Opinion Testimony 16-21

Conclusion 21

7th Circuit Opinion ..... App. 1

Appellate Order 3-5-04 ..... App. 55

Appellate Order 5-5-04 ..... App. 56

District Court Opinion ..... App. 57

TABLE OF AUTHORITIES

CASES:	PAGES(S)
Claar v. Burlington Northern R.R. Co., 29 F.3d 499 (9th Cir. 1994)	17
Clark v. Takata Corp., 192 F.3d 750 (7th Cir. 1999)	17
Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)	13
Dhillon v. Crown Controls Corp., 269 F.3d 865 (7th Cir. 2001)	14
Ignarski v. Norbut, 271 Ill.App.3d 552 (Ill.App. 1995)	6
Kelsay v. Consolidated Rail Corporation, 749 F.2d 437 (7th Cir. 1984)	11
Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999)	16
Nachtscheim v. Beech Aircraft Corp., 847 F.3d 1261 (1987)	8
Smith v. Ford Motor Company, 215 F.3d 713 (7th Cir. 2000)	18
Smith v. Gildea, No. 97 C 1581 (1998)	13
U.S. v. Abel, 469 U.S. 45 (1984)	7

Young v. James Green Management, Inc.,
327 F.3d 616 (7th Cir. 2003) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The U.S. Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to warrant review by this Honorable court.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 359 F.3d 892 (7th Cir. 2004).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on March 5, 2004. The petition for rehearing was denied on May 5, 2004. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This cause being brought originally before the United States District Court for the Northern District of Illinois, Eastern Division, in diversity pursuant to 28 U.S.C. 1332. Respondent, a resident of Florida, brought this action against Petitioners, Illinois residents, for an amount in controversy over $75,000. Respondent alleged legal malpractice in connection with Petitioner's handling of a personal injury claim.

Respondent Helen Mihailovich ("Mihailovich") is the sole surviving witness to a single-vehicle automobile accident involving Mihailovich and her husband, who is now deceased. On July 1, 1986, Mihailovich and her husband were driving southbound on Kedzie Avenue in Cook County, Illinois approaching what is known as the Kedzie curve. The Kedzie curve is an approximately mile long stretch of road consisting of an S-curve. Drivers approaching the curve from the North would (southbound) encounter a turn to the right and then to the left. It was rainy, drizzling, and foggy. (T 183). The van they were traveling in skidded off the right side of the road. The force of impact caused Mihailovich to land in the back of the van, injuring her. (T 183). Mihailovich could not state how fast her husband was driving when he lost control, but said "we were flowing with the traffic and his speed was regular." She did not know if her husband braked prior to the accident. (T 106-107). She did not know whether this occurred at the first curve or the second curve on Kedzie Avenue, as the car went off the road in a split second, so fast that she could not trace it back in her memory. Mihailovich described the speed of the event as, ". . . just like a bullet." (T 207-208).

Respondent's late husband first hired Attorney Morton Abt to represent Respondent regarding the collision. (T 186). Respondent subsequently changed lawyers, re-

taining Eugene Pavalon of Petitioner. (T 187). Pavalon introduced Respondent to Gary Laatsch, another attorney in Pavalon's firm, and in June 1987 he filed a complaint in the Circuit Court of Cook County against the County of Cook alleging negligence in the maintenance of the Kedzie curve. (T 187, 335). Laatsch talked to attorney Abt and learned that Abt had retained Herbert Miller, a structural engineer, to go to the scene and take pictures, which he did approximately two months after the collision. (T 336). Although Laatsch did not retain Miller, he communicated with him and reviewed information Miller developed from the materials provided by Attorney Abt, including photographs of the Kedzie curve. (T 361). However, Miller's photographs did not necessarily reflect the area(s) where the Mihailovich vehicle left the road or whether the area they showed was contributory to the accident. (T 390). Miller was unable to determine the location of the accident, despite visiting the scene. (T 392). No photographs existed either of the specific area where the Mihailovich van left the road, or of the portion of the roadway the van traveled in its pre-accident condition. (T 341).

Laatsch obtained a copy of the accident report and talked to Walter and Helen Mihailovich about the collision. Other than explaining that the van left the road somewhere in the northern portion of the Kedzie curve, the Mihailoviches could provide no information as to precisely where the van left the roadway. (T 343). The police report and diagram were not helpful because it did not contain references to where the Mihailovich vehicle began its slide and left the roadway. (T 343-344).

When visiting the scene in March 1987, Laatsch walked up to a block in each direction from the approximate area where the van came to rest. The road appeared to be asphalt, with no particular defects, significant potholes or crumbling or cracking of the surface. Laatsch knew

that the co-efficient of friction for the curve would be an issue in evaluating the road. However, nearly a year had passed since the accident, and it was not possible to determine the co-efficient of friction of the road surface at the time of the accident because the road surface condition changed in the months after the accident. Moreover, since the vehicle involved in the accident had been destroyed, there was no opportunity to test the co-efficient of friction of the van's tires. As there was no data or information regarding the condition of the road or the van's tires and no evidence of the speed that Mr. Mihailovich was traveling when he lost control of the van, it was not possible to replicate the conditions that existed at the time of the accident. (T 353-354).

During discovery Laatsch learned that there had been a number of other accidents along the Kedzie curve and obtained data about curve studies by Cook County in which testers drove vehicles through the north and south portions of the Kedzie curve to determine an appropriate speed limit and traffic advisory. (T 357). According to records that Laatsch obtained from Cook County, the County periodically maintained the road, conducted inspections twice a month, and had repaired Kedzie Avenue north of the curve in 1981 and 1982. (T 375-76). In 1984, the Village of Olympia Fields, the municipality in which this section of road was located, passed a resolution pertaining to the Kedzie curve regarding the hazardous condition of this road. (T 371).

Laatsch contacted an expert, Lawrence Berg, in May 1992, and provided him with the investigation materials. (T 361). Berg told Laatsch that he was unable to determine whether the roadway was defective at the time of the occurrence. (T 381). Laatsch told the Mihailoviches he was having difficulty finding an expert to support the claim. Mihailovich discharged Laatsch on February 28,

1997 and directed him to send her complete file to the Law Offices of Edward Vrdolyak. Several firms reviewed the file at Mihailovich's request, but by November 1, 1997, Mihailovich had still not retained new counsel. (T 741).

On January 27, 1998, the circuit court allowed Laatsch to withdraw as Respondent's attorney and reset the trial to July 22, 1998. The January 27th order contemplated that new attorneys would be allowed to enter an appearance for the Respondent within forty-five days. The judge emphasized that once Mihailovich hired new attorneys, the discovery schedule would be readjusted to allow the attorneys time to get up to speed and do what they needed to take over the representation. (T 408-409).

After Petitioners withdrew their appearance, Respondent retained attorney Mark R. McKenna confirmed by letter dated June 9, 1998 and signed by Respondent (T 281). At least one month after agreeing to handle Respondent's case, McKenna went to court on behalf of Respondent seeking a continuance of the trial and additional time to disclose witnesses. McKenna also sought leave to file an appearance for Respondent (T 266). He presented these motions on June 12, 1998. The judge denied the request to continue, but granted McKenna leave to file his appearance and leave to disclose fact and expert witnesses. (T 267). Between June 12, 1998 and July 8, 1998 McKenna failed to disclose trial witnesses and the County presented a motion to bar Mihailovich from calling witnesses due to this failure to disclose. The motion was granted as was a subsequent motion for summary judgment for the County based on plaintiff's lack of proof.

In 1997, Respondent filed this suit for legal malpractice against Laatsch and his law firm. Under Illinois law, legal malpractice claims require plaintiffs to prove both that the defendant performed negligently and that plaintiff had a meritorious underlying claim that she lost due

to the defendant's negligence. *Ignarski v. Norbert*, 271 Ill.App.3d 522,525 648 N.E.2d 285, 288 (1995).

Petitioner presented a motion in limine to exclude all evidence regarding other accidents at the Kedzie curve. (T 247-48, 685-88). The district court concluded that there was ample evidence to establish that the surface of the curve became slick when wet. (T 686). Moreover, the court weighed the probative value of evidence of other accidents against the potential for undue prejudice to Petitioner. The district court found that the probative value of other accidents was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence (Tr. 685-688). The jury found in favor of Petitioner.

Respondent's appeal was based upon the district court's exclusion of all evidence of other accidents that occurred on the Kedzie curve. The Court of Appeals held that the other accidents were substantially similar to the Mihailovich accident and thus admissible as evidence of a defect because they fell within a pattern, and therefore that the district court abused its discretion excluding evidence of the other accidents. The Court of Appeals vacated the judgment of the district court and remanded the matter for a new trial. As the Court of Appeals departed so far from the accepted and usual course of proceedings for reviewing the district court's exclusion of evidence, Petitioner seeks review in this Court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXCLUDED OTHER-ACCIDENTS EVIDENCE

Respondent attempted to introduce evidence of the existence of numerous prior and subsequent accidents that

occurred on or near the Kedzie curve. She sought to introduce evidence of these other accidents for the claimed purpose of showing Cook County's knowledge of the dangerous-when-wet Kedzie curve. However, it was apparent that the real purpose was to establish that the Kedzie curve, or at least the portion of the mile and a half stretch where Mihailovich's accident occurred, was dangerous.

The Court of Appeals erred in holding that the district court abused its discretion by excluding evidence of other accidents in the general area of the Mihailovich accident. A district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules. *U.S. v. Abel,* 469 U.S. 45, 54, 105 S.Ct. 465,470 (1984).

The district court did not abuse its discretion by excluding evidence of other accidents because Respondent failed to establish by offer of proof that she had competent evidence showing that the other accidents were substantially similar to her accident. Moreover, the prejudicial effect outweighed the probative value. Thus, the court properly excluded the testimony under FRE 403.

1. Respondent Failed to Make an Offer of Proof to Establish that the "Other Accidents" were Substantially Similar

The district court did not abuse its discretion by excluding evidence of other accidents because plaintiff failed to make an offer of proof of competent evidence showing that the other accidents were substantially similar to hers. Therefore, the court properly excluded the testimony under FRE 403.

The Kedzie curve is an approximately mile long stretch of road consisting of an S-curve. Drivers approaching the

curve from the North would (southbound) encounter a turn to the right and then to the left. Plaintiff's theory was that the surface of the Kedzie curve was "polished" through the application of vehicles' brakes over time, making the surface slick when wet and causing drivers to lose control due to a reduced coefficient of friction. Based on plaintiff's theory of the defect and the laws of physics, a southbound vehicle entering the curve on the highly "polished" road surface would or could lose control due to insufficient traction. However, simple physics establishes that a vehicle traveling in this manner would go off the road to the south (or the) left—continuing its forward momentum. That is not how plaintiff's accident occurred, however. Plaintiff's vehicle successfully negotiated the "polished" surface, with ample traction, and traveled *to the right.*

The appellate court held that the other accidents were "substantially similar" to plaintiff's, and therefore were admissible, because: (i) they occurred at the Kedzie curve; (ii) they occurred relatively close in time to plaintiff's accident; (iii) the condition of the curve was no different at the time of all of the accidents; (iv) a majority of the accidents occurred when the road was wet; and (v) the police reports reveal a pattern of drivers losing control of the vehicles. (Opinion, p. 31).

In order to make a finding of "substantial similarity," the Court, looking at the *established* facts underlying plaintiffs accident and other accidents on the mile-long stretch of roadway, must consider whether the facts reasonably support an inference that all of the accidents share a common cause, namely the defect that plaintiff alleges. (Opinion, p. 30, citing *Nachtsheim v. Beech Aircraft Corp.*, 847 F.3d 1261, 1269 (7th Cir. 1987). The court held that:

> As the circumstances and conditions of the other accidents become less similar to the accident un-

> der consideration, the probative force of such evidence decreases. At the same time, the danger that the evidence will be unfairly prejudicial remains. 'The jury might infer from evidence of the prior accident alone that ultra-hazardous conditions existed . . . and were the cause of the later accident without those issues ever having been proved.' *Nachtsheim* at 1269.

In *Nachtsheim*, the Seventh Circuit affirmed the district court's exclusion of prior accidents in a products liability case involving an airplane crash. *Id.* at 1265, 1269-70. The plaintiff's theory of defect involved airframe ice accumulation on the plane's elevator that prevented the pilot from recovering from a stall. *Id.* at 1265. Plaintiff sought to introduce evidence of a crash of an identical aircraft. *Id.* at 1266-67. However, the only evidence plaintiff proffered regarding substantial similarity was that both airplanes crashed within a one-year span; that they were both in icing conditions; and that both had airframe ice accumulation. *Id.* at 1267. The district court excluded the evidence, finding that there were so many dissimilar facts and "so few established facts to indicate similarity" that the probative value of the comparison was outweighed by the prejudicial effect and confusion caused. *Id.* The court agreed, holding that plaintiff failed to provide a link between the other accident and plaintiff's theory of their case. *Id.* at 1269.

Here, the facts regarding other accidents are no more compelling or substantially similar than those proffered and rejected by the Seventh Circuit in *Nachtsheim*. The Respondent offered only hearsay evidence (solely through information contained in police reports—whether directly or through her expert) that other cars were involved in undescribed accidents at unidentified points on the mile-long Kedzie curve, within a four year span, and more

often when the pavement was wet. However, the exact location and manner in which these cars left the road is critical to Respondent's theory of defect and is essential to the determination of "substantial similarity." Respondent's accident does not comport with the physics of her theory of the roadway defect, rendering the lynchpin for the substantial similarity requisite for admissibility of other accidents absent. The analysis is whether other accidents that occurred along this curve were substantially similar, not to each other, but rather to the Respondent's accident. Respondent has not and cannot present this evidence, as even the hearsay accident reports show that no other accident happened as Respondent's did.

The Respondent conceded and the court below noted that the variables that may have contributed to the other accidents along the Kedzie curve are "almost infinite." (Opinion, pp. 25-26). Respondent proffered *no* evidence that *any* of the other accidents occurred in a manner similar to hers, with the exception of other accidents on wet pavement. The fact that an allegedly high number of accidents occurred at various points along the S-curve does not equate to "substantial similarity" with her accident without additional, specific facts of the other accidents to show that they, and Respondent's accident, shared a similar cause: the polished roadway surface.

As in *Nachtsheim,* there are few established facts here to indicate similarity, leaving only speculation as to the variables involved in accidents, including speculation about: vehicle speeds; driver age; driver ability; driver alertness; driver sobriety; lighting conditions; traffic conditions; obstructions; driver error; driver reaction to the purported hazard; direction of travel; brake application; brake condition; vehicle load; vehicle malfunction;

and weather conditions, including wind direction and speed, and the amount of rainfall, snow or sleet. Accidents that are not substantially similar to the Respondent's cannot be admitted to show the existence of a dangerous condition. *Nachtsheim* at 1268.

While the court below held that the four-prong test utilized by the Court in *Kelsay v. Consolidated Rail Corp.*, 749 F.2d 437 (7th Cir. 1984) (affirming the exclusion of other accident evidence) was not exhaustive, each of these prongs was met here. First, as discussed above, there is no proffered evidence that conditions and circumstances of the other accidents were not different in some respect. There simply is little evidence of similarity other than wet or icy conditions, which logically creates more dangerous road conditions—a phenomenon not so "extremely unusual" as plaintiff's expert Box opined. (R. 105).

Second, there was no evidence of any other litigation against the County with respect to the Kedzie curve, despite the allegedly high number of accidents[1] allegedly caused by the road condition. As the court below observed, one cannot reasonably expect every motorist who loses control to file a lawsuit (Opinion, p. 37); however, here we have none with the exception of the Respondent suit.

Third, it is likely that that the jury would improperly infer that from the prior accidents alone that the Kedzie curve was dangerous. For this reason, the threshold of substantial similarity must be high. Location and wet pavement are insufficient. There must be substantial

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[1] Respondent presented no evidence to permit a conclusion that the number of accidents at the curve was high, as plaintiff made no comparison to the accident rates of any other road, intersection, or curve with similar traffic loads and speeds.

similarity to permit an inference that the accidents had a common cause: The alleged road defect. Even if a portion of the curve was dangerous, or more dangerous than other portions of the curve, Respondent proffered no evidence that her accident occurred at this dangerous location. The Kedzie curve was more extensive, complicated, and contained more variables than the railroad crossing in *Kelsay*, compelling greater similarity.

Respondent offered evidence that the condition of the curve had not changed over time, that Olympia Fields considered the curve hazardous and passed a resolution to that effect, and that signage had been placed on the curve to notify drivers that the road was slippery when wet (a designation not posted on most curves). Coupled with plaintiff's testimony regarding her own accident and the weather conditions, the jury was presented sufficient, non-prejudicial evidence of the condition of the curve to determine whether a hazard or defect existed.

The Court below reasoned that because the number of accidents decreased after the County reconfigured the road, the prior condition of the road had something to do with the accidents that occurred there. Even assuming that Respondent's accident could be shown to be similar to the other accidents at the curve, or even to some of those accidents, the reduction of accidents is allegedly the byproduct of reconfiguration of the road, making it a subsequent remedial measure inadmissible as proof of the County's liability. *See* F.R.E. 407. Further, introduction of the other accidents for the purpose of showing a defect would, contrary to the court's holding (Opinion, p. 39), require Petitioner to litigate or effectively defend each of those accidents to disprove the existence of a defect, the role of the alleged defect in causing the accident or fault on the part of the County.

2. Exclusion of Details of Other Accidents that Allegedly Occurred in the Same General Area of Plaintiff's Accident did not Affect the Outcome as Plaintiff did not Proffer Admissible Evidence of the Existence or Specifics of the Other Kedzie curve Accidents

The appellate court held that there was a significant chance that the exclusion of the other accident evidence affected the outcome of the trial, and therefore, an evidentiary error would require setting aside the verdict. (Opinion, pp. 40-41). However, Respondent failed to proffer admissible evidence of the existence or specifics of any other accident along the Kedzie curve stretch. Respondent only offered (and presumably only possesses) hearsay evidence in the form of police reports and compilations and expert reports created from the hearsay police reports. Police reports, hearsay-within-hearsay compilations, and expert reports are not admissible. *See* FRE 803; *Young v. James Green Management, Inc.*, 327 F.3d 616, 622 (7th Cir. 2003). *See also Smith v. Gildea*, No. 97 C 1581, 1998 WL 703677 at *6 (N.D.Ill. Sept. 30, 1998) (independent evidentiary basis required for admission of third-party statements contained in police reports). Respondent could not have introduced the evidence of the other accidents except through hearsay testimony, which is also inadmissible, because no first-hand witnesses of the other accidents were disclosed or proffered.

Respondent's only avenue of introducing other-accident evidence is through the testimony of her expert, William Berg, based on his review of the hearsay police reports. However, William Berg testified that these police reports were sometimes incomplete, vague or inconsistent. Accordingly, under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Berg's testimony with respect to these other accidents, which is based solely on this unreliable data, is not admissible.

Dhillon v. Crown Controls Corp., 269 F.3d 865, 869 (7th Cir. 2001) (court to assess whether expert testimony based on sufficient facts or data in determining admissibility).

Moreover, the court below incorrectly stated that investigation of the accident site and road surface were foreclosed to Respondent because the road no longer existed (Opinion, p.41). This is untrue. Evidence showed that several people examined the road after the Mihailovich accident, but any inspection was virtually meaningless because Mihailovich could not identify where on the Kedzie curve their van left the road. Therefore, Mihailovich was confined to proving the defect in the road by indirect means as a result of her own failure to identify where her husband drove off the road; the change in road conditions was secondary. Moreover, the court below accused Laatsch of failing to obtain and preserve any data regarding the coefficient of friction, but the court disregarded the important fact that Laatsch determined that the road condition had changed from its condition on the day of the accident and no one could identify precisely where the Mihailovich vehicle left the road, making a test of the road surface at any given area nothing more than a guess.

After concluding that the district court abused its discretion in excluding the evidence of other accidents, the court below considered whether the exclusion was prejudicial to the respondent. The court stated that in the absence of direct evidence of the condition of the road, respondent was limited to proving her case against the County by indirect means. Primary among these means, the court observed, was proof that other accidents occurred regularly at the curve when the curve was wet. However, the district court barred respondent from presenting this evidence due to the lack of evidence of substantial similarity to the Mihailovich accident. The court below determined that the exclusion of other acci-

dent evidence was prejudicial to the respondent because the jury might have ruled differently if it had known that County employees and the Village of Olympia Fields *perceived* that the road was dangerous *because* motorists were "*regularly* losing control of their vehicles when the pavement was wet." (Emphasis added).

The court's analysis mischaracterizes the evidence and its import, and gives relevance to perceptions as opposed to facts. The suggestion that motorists were "regularly" losing control of their vehicles is false and is the very reason why other accident evidence is prejudicial—it leads to a conclusion that the road surface somehow caused the motorists to lose control. Moreover, because respondent failed to offer even a scintilla of evidence of traffic and accident rates on the Kedzie curve or elsewhere, the court below had no context to evaluate the allegedly high accident rate. Similarly, the jury had no basis of comparison, and plaintiff offered none, to establish that the accident rate at the Kedzie curve—on dry pavement or on wet—was different in any way from any other road.

The court was lured into the very trap that must be avoided with prejudicial evidence: there were accidents, reportedly a large number of accidents, when the curve was wet; therefore, since Respondent's accident happened when the road was wet, the accidents must share a similar cause and the road must be defective. If this is all that is required to establish a defect, cases against municipalities and counties will be much easier to prove.

Because Respondent has no vehicle for offering admissible evidence of the other accidents[2], the district court's preclusion of this evidence did not affect the outcome of the trial.

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[2] The Court below did not address how plaintiff would (or could) introduce the other-accidents evidence. (Opinion, p. 10, n. 6).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN BARRING WILLIAM BERG'S OPINION TESTIMONY

The district court granted Petitioner's motion in limine and excluded the testimony of Respondent's expert, William Berg, finding Berg's methodology did not meet the standards established by this Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court below did not formally review the district court's exclusion of this evidence, it devoted eleven pages of its opinion to "observations" that it directed the district court to consider when addressing this issue on remand. Because these observations are applicable to the district court if this matter is re-tried, Petitioner raises the admissibility of this evidence here.

In *Daubert*, this Court set forth criteria for determining whether expert testimony is reliable and therefore relevant and admissible. Under amended Rule 702, the district court assesses (1) whether the expert testimony is based upon sufficient facts or data; (2) whether the expert testimony is the product of reliable principles and methods; and, (3) whether the witness has applied the principles and methods reliably to the facts of the case. *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir. 2001). The review of a district court's decision to exclude evidence is deferential. Where there is no dispute that the district court properly applied the *Daubert* framework, the court of appeals reviews the decision to exclude proffered expert testimony "only for abuse of discretion, asking whether the judge has relied upon a forbidden factor or failed to consider an essential factor." *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir. 2001). A trial judge is granted broad latitude to determine whether or not *Daubert's* specific factors are reasonable measures of reliability. *Kumho Tire Co.*,

v. Carmichael, 526 U.S. 137, 138, 119 S.Ct.1167,1170 (1999).

Daubert holds that to be admissible under rule 702 of the Federal Rules of Evidence, the subject of an expert's testimony must be scientific . . . knowledge. *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795. The adjective "scientific" implies a grounding in the methods and procedures of science. The word "knowledge" connotes more than subjective belief or unsupported speculation. In assessing the admissibility of expert evidence, the focus "must be solely on principles and methodology, not the conclusions that they generate." *Id.* The district court must consider whether a theory or technique can be and has been tested; whether it is generally accepted in the scientific community; whether it has been subject to peer review and publications; and whether the known or potential error rate is acceptable. 509 U.S. at 593-594. The court should consider "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert*, 43 F.3d at 1317. Additionally, the court may consider whether the expert conducted research and formed an opinion or formed an opinion then looked for reasons to support it. *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 503-504 (9th Cir. 1994).

In *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1999), the court held that an expert's credentials are important only in determining whether he is qualified to testify; the court should treat the reliability of the expert's testimony separately from the expert's overall qualifications. *Clark* at 759, n. 5. Once an expert is determined to be qualified, the court should concern itself primarily with the expert's analysis and methodology and not accept the *ipse*

dixit or bare assertion of the expert. *Id.* at 759. In *Clark,* an expert merely assumed that a lap belt unlatched during an accident sequence and conducted no investigation to determine the correctness of this assumption. The court stated:

> ". . . a liability expert is only helpful to the finder of fact if he is able to establish such an element of the claim through visual inspection, independent research, testing and knowledge. . . . " *Id.* at 756.

To be admissible under FRE 702 an expert's testimony must be relevant and reliable. *Smith v. Ford Motor Company,* 215 F.3d 713 (7th Cir. 2000). *Daubert's* "gatekeeping" obligation, requiring an inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony. *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137, 147 (1999) (*Daubert* factors apply to an engineering expert's testimony). The expert's testimony must be based on valid scientific knowledge and it must assist the trier of fact with a fact issue. *Smith,* 215 F.3d at 718. There is a significant limitation on the admissibility of expert testimony. Specifically, the factual underpinnings of the expert's opinions must be sound, and his analysis must be premised on a recognized scientific method.

In *Smith* the court held:

> "A court's reliability analysis does not end with its conclusion that an expert is qualified to testify about a given matter. Even '[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some scientific method.' (Citations omitted). However, we emphasize that the court's gate keeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the

> correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." *Smith* at 718.

The court also cautioned that "hypothetical alternatives (offered by experts) must themselves have 'analytically sound bases' so that they are more than mere 'speculation' by the expert." *Id.* at 719. Where the expert's opinions and conclusions are mere speculation and do not have analytically sound bases, the testimony is inadmissible. *Clark,* 192 F.3d at 759. A district court is required to rule out subjective belief or unsupported speculation by considering whether the testimony has been subjected to the scientific method. *Id.*

Respondent had two opportunities to present a basis for Berg's opinions. The first was in the deposition of Berg, the second in the *voir dire* examination. Berg's testimony is based on what he called a "human factors" analysis. However, he could not provide any specifics as to when studies he referred to were done, what type of peer review the studies were subject to, whether the studies had a control group, or whether the drivers who participated in the studies were interviewed. He could not establish that his opinions and conclusions satisfied the rigorous requirements of *Daubert* and *Kumho Tire*, i.e., he was unable to provide substantiation and analysis for his opinions and conclusions. Berg concluded that the roadway was defective because vehicles were caused to leave the roadway due to a low coefficient of friction when the pavement was wet. However, no coefficient of friction testing was conducted. Berg testified about "brake applications" and stated that drivers involved in collisions at the subject scene tended to apply their brakes "frequently" after entry into the curve. Berg testified that drivers were approaching the curve at a speed 10 mph

higher than the advisory speed for the curve and therefore were required to brake. Berg based his conclusion on the fact that drivers slow down and sometimes brake when they approach a curve, but he had no actual braking or speed data.

Berg did not conduct any testing at the scene of the accident and made no comparison or analysis of the variables of any of the accidents at the site, including the subject accident. He appears to have engaged only in a distorted syllogistic reasoning process: other accidents happened when the road was wet; this accident happened when the road was wet; therefore, the wet road must have caused the accidents. This is not an analytically sound basis and surely is not the type of scientific methodology employed by engineers to determine cause and effect relationships. The court affirmed the exclusion of expert testimony in *Dhillon* where the experts failed to conduct testing and failed "to take any steps that would show professional rigor" in assessing the design alternatives on which the plaintiff sought to have the experts testify. *Dhillon* at 869. Moreover, the decision to exclude expert testimony in *Dhillon* was proper because certain aspects of the expert's testimony were matters of common sense, something that it "shouldn't take a rocket scientist to figure out." *Id.* The expert must offer more than what is obvious to laypersons on the jury in order to be of assistance to them. *Id.* Here, Berg offered that drivers tend to brake when they want to slow their vehicles. This wasn't something the jury needed the assistance of an expert to understand. Accordingly, the district court's decision to exclude Berg's opinions was not an abuse of discretion. The district court properly found that Berg's speculative testimony was inadmissible. "A liability expert is only helpful to the fact finder if he is able to establish such an element of the claim through visual inspection, independent research, testing, and knowledge."

Clark, 192 F.3d at 757. Berg offered no independent research, testing, or knowledge to assist the trier of fact. Rather, he offered only the type of simple conclusion that anyone can make: a surface is more slippery when wet. Berg's opinions are pure speculation and junk science devoid of any study or analysis to support them. Consequently, Berg's opinions were inadmissible and properly barred, precisely the evil that district court is to prevent in its role as gatekeeper; the district court appropriately exercised its discretion as a gatekeeper by barring these opinions.

CONCLUSION

The court below significantly departed from the accepted and usual course of judicial proceedings so as to warrant review in this Court. The district court did not abuse its discretion in excluding evidence of other accidents that occurred near the area of Respondent's accident as there was no showing that the accidents were substantially similar to the Respondent's accident. Moreover, the district court did not abuse its discretion in excluding the testimony and opinions of William Berg, as his opinions were not based upon a reliable methodology and constituted the mere *ipse dixit* of the witness.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3885

HELEN MIHAILOVICH,

Plaintiff-Appellant,

v.

GARY LAATSCH and LAW OFFICE OF PAVALON, GIFFORD, LAATSCH & MARINO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 4780—**John W. Darrah**, *Judge.*

ARGUED SEPTEMBER 18, 2002—DECIDED MARCH 5, 2004

Before BAUER, MANION, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* A one-car automobile accident on a curved roadway maintained by Cook County, Illinois (the "County") caused Helen Mihailovich to suffer a spinal cord injury. Mihailovich filed suit against the County in state court, alleging that it had been negligent in its care and upkeep of the roadway and that the condition of the roadway was a contributing cause of the accident. Attorney Gary Laatsch and the law firm now known as Pavalon, Gifford, Laatsch & Marino (collectively "Laatsch") filed

the suit on Mihailovich's behalf but withdrew from the case approximately six months prior to the scheduled trial date. The attorney who succeeded Laatsch was unable to convince the court to continue the trial date, and after Mihailovich's new counsel was unable to retain an expert and to identify other individuals who might testify on her behalf, the court entered successive orders barring Mihailovich from presenting witnesses and then granting summary judgment in favor of the County. Mihailovich, now a citizen of Florida, subsequently filed suit in diversity against Laatsch, charging him with legal malpractice. The malpractice suit proceeded to trial, and the jury held in Laatsch's favor. Mihailovich appeals, contending that the district judge erred in certain evidentiary rulings that constrained her ability to show that the roadway on which her accident occurred was dangerous and that she would have prevailed in her suit against the County but for Laatsch's alleged malpractice. Because we conclude that the district court abused its discretion in excluding evidence of other accidents that had occurred at the location of the Mihailovich accident, we vacate and remand for a new trial.

I.

Early in the evening of July 1, 1986, Mihailovich's husband Mike picked her up after work at the Olympia Way train station in Olympia Fields, Illinois, a suburb southwest of Chicago. On leaving the train station, they proceeded south on Kedzie Avenue with Mr. Mihailovich at the wheel of their 1978 Chevrolet Nomad van. Between 205th and 207th Streets, they encountered what is known as the Kedzie curve, a reverse S-curve that connects Kedzie Avenue with Olympian Way. As the "S-curve" appellation suggests, the Kedzie curve comprises two successive curves: a northern curve that turns to the west, and

a southern curve turning back to the east. Mihailovich did not know exactly how fast her husband was driving, but later testified that "[h]e was going with the traffic and the speed was regular." Tr. 207. She noticed nothing unusual in his manner of driving. It was raining or drizzling as it had been throughout the day, and the pavement was wet. Somewhere along the S-curve (Mihailovich could not recall where), their van slid off the roadway, tumbled into a ditch, and came to rest upside down. Mihailovich could not recall whether or not her husband had braked prior to the accident. The event was "just like a bullet," she later testified (*see* Tr. 209, quoting her deposition testimony); it happened "in a spare moment, in a spare second" (Tr. 182). As a result of the accident, Mihailovich suffered a spinal cord injury that required months of hospitalization and rehabilitation and permanently limited her mobility.[1]

Police officer Mark Fazzini was summoned to the scene of the accident at approximately 6:40 p.m. Fazzini served on the Olympia Fields police force for twenty-five years and retired in 2000 as its chief. Over the course of his work for the Village, he traveled the Kedzie curve many times each day. When Fazzini reached the scene, he discovered the overturned Mihailovich van on the west side of a ditch in front of a residence located at 20540 Kedzie Avenue, a position near the south end of the northern curve. Fazzini described the Kedzie roadway as a two-lane road that was long and straight on either end of the S-curve, with only a broken yellow line separating the two lanes of traffic, each moving in an opposite direction (north and south). So far as Fazzini knew, no maintenance work had been done on the curve from 1980, by which time the

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[1] Mihailovich's husband was killed in a head-on automobile collision that occurred after this accident. The record is therefore confined to Mihailovich's own limited recollection of the accident.

County had assumed responsibility for the curve from the State, through the date of the Mihailovich accident in 1986. Fazzini's written report of the accident indicated that there were "no defects" in the road.

By way of background, we pause at this point to note that the Kedzie curve had something of a notorious reputation among local officials as a traffic hazard. Accidents occurred regularly along the S-curve, particularly when the pavement was wet, and there was a perception among officials that the frequency of accidents had increased since the County had resurfaced and widened the roadway to the immediate north and south of the Kedzie curve (but not the bulk of the S-curve itself) in 1981-1982. Concern about the accident rate had moved the board of trustees of Olympia Fields in 1984 to enact a resolution calling upon the County to address the problem. Partly in response to that resolution, the County in late 1984 and early 1985 had installed additional signage alerting motorists to the winding character of the road, reducing the advised speed through the curve, and warning drivers that the pavement was slippery when wet. These signs were in place at the time of the Mihailovich accident in 1986. However, the County had not resurfaced or otherwise addressed the condition of the roadway itself, and notwithstanding the additional warning signs, accidents continued to occur with regularity until the County reconstructed the S-curve in 1988-1989. At that time, the County increased the radius of the north curve, added a four-foot center rumble strip, added a superelevation of four percent, and resurfaced the roadway. In the wake of the reconstruction, the accident rate dropped from an average of approximately twenty per year to two or three per year. The failure to take such steps prior to the Mihailovich accident is what gave rise to Mihailovich's negligence claim against the County.

The jury in this case was aware that the Kedzie curve was perceived as dangerous by local officials, but heard no

evidence about the other accidents that had occurred at the S-curve in the years immediately before and after the Mihailovich accident. Because Mihailovich has made the district court's limitation her lead issue on appeal, we shall summarize both the evidence that the court allowed and the evidence that the court excluded on this point. Following those summaries we shall describe the other evidence presented in support of Mihailovich's malpractice claim before turning to the merits of her appeal.

Admitted Evidence Regarding the Curve's Potential Hazard

Arthur Kaindl worked as a highway engineer for Cook County for thirty-eight years, rising to the post of Chief Engineer in the Bureau of Maintenance, which he held at the time of his retirement in August 1986. In September of 1983, Kaindl was the Chief Engineer of Transportation and Planning. In that capacity, he received a memorandum from Joseph Marsik, Chief Engineer of Maintenance, forwarding a second memorandum that Marsik had received from Frank Reno, the District Engineer of Maintenance for the district that included Olympia Fields and the Kedzie curve. Although Kaindl was not permitted to read either of the two memoranda to the jury, he indicated that Reno's memorandum expressed a concern that the Kedzie curve was in a dangerous condition. Tr. 555. Upon receipt of these memoranda, Kaindl ordered personnel under his supervision to undertake a review of the curve, including field surveys to assess, among other things, whether the existing signage and posted speed limit at the curve were appropriate to the condition of the curve. The propriety of the speed limit was evaluated using a ball-bank study, which by measuring the degree of sideways sway of a vehicle driving through the curve ascertains the maximum speed at which a motorist will feel comfortable. That study

indicated that thirty miles per hour was an appropriate, comfortable speed through the curve and that was the speed recommended on advisory signs later posted at the curve. Kaindl acknowledged that a ball-bank study is conducted on dry pavement, that it does not measure the coefficient of friction,[2] and that it does not determine a safe speed for the roadway when the pavement is wet. After completing its review of the curve (apparently in 1984), the County did not resurface or reconstruct the curve at any time through August of 1986, when Kaindl retired.

Fred Unger served as the police chief of Olympia Fields from 1971 to 1990. He traveled through the Kedzie curve and observed its condition hundreds of times over the course of his tenure. According to Unger, the pavement at the curve tended to become slick when dampened by precipitation. "During inclement weather, accompanied by precipitation, the roadway would take on a slick surface, and the oil from the pores of the macadam surface would be floated to the top by the amount of water that was hitting the pavement." Tr. 429. Unger indicated that a light rain was sufficient to bring about this condition.

Robert E. Field has lived in Olympia Fields since 1974. He served as a trustee of the Village from 1981 through 1989 and as its president from 1991 through 1997. His home is located one block south and west of the Kedzie curve, and he traveled it at least twice daily through the date of the Mihailovich accident, although both Field and his wife avoided the S-curve during inclement weather. Field described the S-curve as turning to the west and then back to the east and going downhill as it did so; according to Field, a driver could not see from one end of the

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[2] Simply put, the coefficient of friction is the degree of slip resistance. The higher the coefficient of friction, the less slippery the pavement would be.

curve to the other as he entered it. The roadway through the curve comprised two lanes without a center divider, the edges of the pavement were crumbling, the shoulders were gravel rather than paved and were a couple of inches lower than the road itself, the surface of the roadway was very smooth, and over time traffic had worn grooves into the pavement.

Field testified that his primary reason for seeking a seat on the Village board of trustees in 1980 was to do something about the condition of the Kedzie curve, which he had grown to believe was a hazard. He was particularly concerned that the curved roadway became dangerously slick when wet. Following his election and at his urging, the board first enacted a resolution directing the police and public works departments of the Village to assess the condition of the roadway and prepare a report. Upon receipt of that report, Field and another trustee drafted a resolution calling on the County to address the condition of the curve. The Village board adopted that resolution by a unanimous vote on October 10, 1984.

Anita Healy served on the Olympia Fields board of trustees beginning in 1979 and as its president from 1981 through 1989. Healy read to the jury the following redacted version of the Village's 1984 resolution regarding the Kedzie curve:

> WHEREAS, it is a fact that a portion of Kedzie Avenue lying between 207th Street and 206th Street in the Village of Olympia Fields is a county maintained roadway;[3] and

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[3] [Footnote by the court] The evidence indicates that as one moves from north to south, the Kedzie curve actually begins prior to 206th Street, but the record is silent as to why the resolution referred only to the roadway between 207th Street and 206th

(continued...)

WHEREAS, . . . it appears to be an eminently dangerous roadway particularly under certain hazardous weather conditions; and

WHEREAS, the Village Board of the Village of Olympia Fields as the governing body of the said Village wishes to inform the County Board of Commissioners of the County of Cook, State of Illinois[,] of its concern and alarm over the state of repair, condition, design and road surface material of the aforesaid section of Kedzie Avenue; and

WHEREAS, it has been proposed that the Village by official action of this resolution inform the Board of Commissioners of the County of Cook of the State of Illinois officially and request that immediate action and remedies be instituted to correct the condition of the roadway herein set out:

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Village of Olympia Fields, Illinois, that they hereby petition on behalf of the Village of Olympia Fields, Illinois, a municipal corporation, to the Board of Commissioners of the County of Cook of the State of Illinois that they cause to have undertaken immediate remedial actions to correct the dangerous, unsafe and ill-constructed condition of county road commonly known as Kedzie Avenue between its intersection of 207th Street and 206th Street that lies within the Village of Olympia Fields, Illinois.

This resolution shall be in full force and effect from and after its passage and approval as provided by law.

(...continued)
Street. Field testified that it was his belief that the resolution covered the entire S-curve; he also indicated that the road begins to curve in earnest near 206th Street.

R. 1 Ex. G; Tr. 235-37.[4] Healy sent a copy of the resolution to the County Superintendent of Highways on October 25, 1984.

In December of 1984, the County installed three types of signs that were intended to improve the safety of the curve: a sign advising motorists to reduce their speed to thirty miles per hour, a reverse curve sign, and a "Slippery When Wet" sign.[5] On January 7, 1985, the County's Superintendent of Highways, Richard Golterman, wrote a letter to Village president Healy noting that the County had investigated the "dangerous condition" alluded to in Healy's letter of October 25, 1984, forwarding the Village's resolution to the County. Golterman's letter described the signs that the County had installed and concluded, "We trust that these corrected measures will serve to alleviate this 'dangerous condition', but respectfully suggest that the Village continue to monitor this portion of Kedzie Avenue and keep us advised." Tr. 240; R. 1 Ex. I.

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[4] The resolution that Healy read to the jury was redacted by agreement between the parties so as to comply with the court's order excluding evidence of other accidents that had occurred at the Kedzie curve. Healy was not permitted to read the following italicized clause from the resolution:

> Whereas, . . . *accident records reflect that due to the curvature of this road and the construction thereof*, it appears to be an eminently dangerous roadway particularly under certain hazardous weather conditions[.]

R. 1 Ex. G. (emphasis ours).

[5] The County's decision to install these signs presumably was based on the studies that it had commenced in response to the concerns raised by the Reno memorandum in 1983 as well as the subsequent Olympia Fields resolution in October 1984.

Excluded Evidence Regarding Other Accidents at the Kedzie Curve

Plaintiff's retained expert, civil engineer William Berg, reviewed data maintained by Olympia Fields regarding accidents that had taken place at the Kedzie curve from 1983 through July 15, 1987, and prepared a report which, in relevant part, summarized that data.[6] Berg's report indicated that a total of ninety-four accidents occurred at the Kedzie curve during this period of four and one-half years. In 1983, there were twenty-five accidents, seventeen of which, or sixty-eight percent, occurred when the pavement was wet. In 1984, fifteen accidents occurred, fourteen of them, or ninety-three percent, on wet pavement. In the eighteen months immediately preceding the Mihailovich

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[6] It is unclear from the briefs whether Mihailovich, if permitted to introduce evidence regarding the other accidents, would have introduced that evidence primarily through Berg or through another witness. As the ensuing summary of the excluded evidence indicates, a number of witnesses had varying degrees of knowledge about the accident rate at the Kedzie curve. Berg's written report appears to contain the most complete analysis of those accidents. But engineer Paul Box also looked at the accident data and, like Berg, analyzed and summarized that information. *See* R. 105 (attachment). Former Olympia Fields police chief Fred Unger also had compiled a report about the curve for the Village trustees which included accident data. R. 62 Ex. 24. We assume that any of these witnesses, who appear to have relied on the same basic data, could have testified about the other accidents that occurred at the Kedzie curve in the years immediately preceding and following the Mihailovich accident. We also note that at least some of the underlying accident data itself is in the record. *See* R. 62 Ex. 24 (accident data from Olympia Fields); R. 1 Ex. J (accident reports). As the parties' appellate arguments are focused solely upon the admissibility of other-accident evidence, rather than upon how that evidence might have been introduced, we need not explore the latter issue.

accident (January of 1985 through June of 1986), a total of twenty-nine accidents took place, twenty-two of them, or seventy-six percent, on wet pavement. In the (approximately) one-year period following the Mihailovich accident (July 1, 1986 through July 15, 1987), another twenty-five accidents occurred, twenty of them, or eighty percent, when the pavement was wet. Berg also reviewed police reports that were available for twenty-four of the twenty-nine accidents that occurred in the eighteen months prior to the Mihailovich accident. According to Berg, in twenty-one of those twenty-four accidents, a vehicle had been proceeding southbound on Kedzie Avenue into the curve and had either left the roadway altogether inside or outside of the curve or had crossed the center line and collided with a northbound vehicle. R. 62 Ex. 6.[7]

Village president Anita Healy would have testified that the occurrence of serious accidents at the curve, particularly during inclement weather, had been a topic of discussion among Village officials for a number of years. She knew of one fatality and multiple injuries that had resulted from such accidents. To Healy's knowledge, no other curved roadway in the Village had a comparable rate of accidents, injuries, and fatalities. When Healy sent the Village board of trustees' 1984 resolution regarding the Kedzie curve to the County Superintendent of Highways on October 25 of that year, she wrote in her transmittal letter that "[w]e have been receiving increased numbers of complaints about the roadway in that area and requests to remedy the situation." R. 1 Ex. H. Her letter concluded: "It

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[7] Berg's report notes that in the aftermath of the Mihailovich accident, the County reduced the advisory speed through the curve to twenty-five miles per hour. R. 62 Ex. 6 at 4 ¶ 12. Based on the accident data, Berg observed that "the wet pavement safety problem . . . continued unabated." *Id.*

is our hope that the Highway Department will look into this problem and will determine a way to remedy this dangerous situation." *Id.* According to Healy, after the curve was reconstructed between 1988 and 1989, the accident rate dropped to an "[a]lmost negligible" rate, and there had been no fatalities since then. Tr. 250-51.

Retired Olympia Fields police officer Mark Fazzini would have testified that between 1980 and 1986, "dozens and dozens and dozens of automobile accidents [had occurred] on the Kedzie curve," far more than at any other curve in the Village. Tr. 252. According to Mihailovich's offer of proof:

> [I]t was [Fazzini's] opinion from investigating dozens of collisions that when it rained, a film developed on the surface of the highway, that it became slick, it looked like an oil slick, and that the automobile[ ] collisions that he investigated in the wet inclement conditions always lost traction in the roadway and slid up, either straight ahead, either going into the woods at the far end of the curve, or after sliding would then go off the roadway to the west.

Tr. 252. Fazzini also would have testified that the Village police department had made efforts to slow southbound traffic entering the curve in order to reduce the accident rate:

> [B]ecause of the Village's concern about the cars continuing to pile up and injure and kill citizens out there, . . . the police department literally set up speed traps at the highway to try to get drivers to slow down because they knew that cars coming from the north down into this curve had been traveling through a semirural area and that, as we know in this case, Kedzie Avenue just north of the curve, was resurfaced in 1981, '82 at Biden and this resurfacing went right

> up to the beginning of this north curve and the cars would come into the curve at a high rate of speed because of their assurance they were on a good, sound highway.

Tr. 253. According to Fazzini, the Olympia Fields police department had notified the County of the situation with respect to the Kedzie curve "on more than one occasion," but nothing was done in response. *Id.* Once the curve was resurfaced in 1988-1989, accidents were virtually eliminated.

Village trustee Robert Field would have additionally testified, based on his own observations as a driver who traveled the curve regularly and as a-Village trustee, that a large number of accidents occurred at the curve, that he knew of no other location in the Village with such a high accident rate, and that most or all of the accidents occurred in inclement weather. Tr. 678. Recall that following Field's election to the board of trustees in 1980, he had successfully urged the board to commission a study of the curve. Field would have testified that in the course of that study, the Olympia Fields police department had compiled a multi-year inventory of traffic accidents that had occurred at the curve, and that the police chief at that time, Fred Unger, had presented a report including that compilation to the Village board. That report, according to Field, indicated that "more traffic accidents had occurred on the Kedzie curve than in the rest of the Village combined," (Tr. 680), and that the resurfacing of the roadway to the north and south of the Kedzie curve in 1981-1982 appeared to have resulted in an increase in the number of accidents. Tr. 681-82. Field also was familiar with the additional warning signs that the County had installed at the curve in response to the board's October 1984 resolution. Field recalled that according to the Village's police department, that signage had not had any discernible impact on the

accidents occurring at the curve. Tr. 681. However, after the curve was reconstructed and resurfaced in 1988-1989, the accident rate dropped to near-zero. Tr. 683-84.

Frank Reno, who served in the County's employ for thirty-eight years, was the District Engineer of Maintenance in the early 1980s for the district that included Olympia Fields and the Kedzie curve. In August or September 1983, more than one year before the Olympia Fields board of trustees enacted and transmitted its resolution about the curve to the County, Reno became aware that the rate of accidents with fatalities had increased in the area of the curve in the preceding years. Reno thought that the County should look into the situation at the curve, and for that reason wrote the September 19, 1983 memorandum to Joseph Marsik, Chief Engineer of Maintenance, that Arthur Kaindl had referred to in his testimony. Reno stated in his memorandum:

> In the last two years it has been observed that the accident rate in the above subject area has increased considerably, with fatalities involved. There is a change of alignment with a curve in the pavement alignment between Kedzie Ave. and Olympia[n] Way, and this curve does not seem that sharp and dangerous. The pavement on Olympia[n] Way is very smooth and could contribute to the cause of these accidents. The accident rate has increased since Kedzie Ave. was improved and repaved. It is recommended that this matter be relayed to our design and traffic division.

Tr. 434-35; R. 62 Ex. 10. Neither Marsik nor Reno was permitted to relay the contents of Reno's memorandum to the jury.

Marsik had received Reno's memorandum and agreed with his recommendation that the curve be investigated. Marsik had forwarded Reno's memorandum to Kaindl. In his cover memorandum to Kaindl, Marsik had written:

> Attached herewith is a memorandum from District Engineer Frank Reno pertaining to an alarming increase in traffic accidents at subject location (reversed curve section) between Olympia[n] [Way] and Kedzie Avenue.
>
> It is requested that this section be reviewed.
>
> It is our belief that the traffic is going too fast on the straight roadway, entering the curve and then has a problem negotiating the curve.

Tr. 500; R. 62 Ex. 9.

Evidence Relating to Malpractice

Following her accident in 1986, Mihailovich decided to sue the County. She eventually engaged attorney Eugene Pavalon, who in turn assigned the case to his associate (later his partner) Gary Laatsch. Laatsch filed suit on Mihailovich's behalf in June 1987, alleging that the curve was dangerous, that the County had negligently permitted the curve to remain in an unsafe condition, and that the County had failed to alert motorists to the danger. R. 1 Ex. C. Laatsch believed there was sufficient merit to Mihailovich's claim to warrant discovery. Laatsch represented Mihailovich from 1987 through early 1998, when he formally withdrew from the case.

During his representation of Mihailovich, Laatsch took the following steps (among others) in an effort to build a case on her behalf: (1) He met with Mihailovich at her home on multiple occasions and prepared her for her deposition by the County. (2) According to his trial testimony, Laatsch obtained a copy of the Village's 1984 resolution calling on the County to investigate the Kedzie curve. Tr.

371, 373-74.[8] (3) In 1990, Laatsch obtained copies of the field studies that the County had completed in 1984 in order to ascertain the appropriate speed limit on the Kedzie curve and appropriate traffic advisory signs. (4) He spoke with structural engineer Herbert Miller, who had inspected the scene of the accident two months after it occurred together with Mihailovich's first attorney. Miller had taken pictures of the accident site and had prepared a report for the prior attorney; Laatsch had copies of those materials. But according to Laatsch, Miller told him that "he could never testify" that the pictures he had taken depicted the area where the Mihailovich vehicle had left the roadway and that Miller, in fact, had not been able to determine where precisely the accident had occurred. Tr. 390-92. (5) Laatsch also issued one set of written interrogatories to the County, and as a result of those interrogatories he obtained a list of potential witnesses from the County. He deposed one of these witnesses—Daniel Waters, a sign technician, whose knowledge was limited to the signage at the Kedzie curve and who had no responsibility for the surface of the roadway. (6) Laatsch contacted William Berg, a civil engineer, for purposes of obtaining an expert opinion about the condition of the roadway at the time of the Mihailovich accident. Laatsch sent Berg,

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[8] We note that other evidence in the record indicates that Laatsch may not, in fact, have obtained a copy of the resolution. Laatsch himself testified at his pre-trial deposition that he did not believe he had ever received a copy of the resolution. *See* Tr. 373, 703. Two letters from Laatsch to the Assistant State's Attorney handling the litigation for the County arguably suggest that Laatsch had not received the resolution. Tr. 393-94. Moreover, the case file that Laatsch later sent to the attorney who replaced him did not include a copy of the resolution. *See* Tr. 256, 373-74, 702-03. Nonetheless, because we are obligated at this juncture to construe the evidence in the light most favorable to the defendants, we credit Laatsch's trial testimony.

among other things, a copy of Waters' deposition, along with certain correspondence between Olympia Fields and the County Highway Department. Based on these materials, Berg informed Laatsch that the signs posted at or near the Kedzie curve were sufficient to inform drivers of the condition of the curve. Berg could not otherwise determine whether the roadway was defective at the time of the Mihailovich accident. R. 62 Ex. 5 at 44. (7) In March 1987, Laatsch visited the scene of the accident. He walked a half block in each direction from the point where the Mihailovich van had come to rest, and he also drove through the curve in both directions. He observed no significant potholes or other defects in the pavement, nor did he recall the shoulders being gravel and/or lower than the roadway itself. Based on the information available to him (including the accident report), however, he could not determine where the Mihailovich's van had begun to slide or where it left the roadway. He also spoke to an eyewitness to the accident (Harold Moore, the police chief of nearby Crestwood), but did not take a formal statement from him. (8) Finally, he obtained records from the County indicating that it inspected the roadway twice per month and periodically maintained it.

However, Laatsch did not undertake the following steps: (1) He never spoke with Mark Fazzini, the Olympia Fields police officer who investigated the scene of the Mihailovich accident, choosing instead to rely on Fazzini's accident report. (2) He neither contacted nor deposed any Olympia Fields official, including Healy or Field, to discuss the Village's 1984 resolution regarding the Kedzie curve or the basis for that resolution. (3) Other than Waters, who disclosed in his deposition that he was not responsible for the road surface of the Kedzie curve, Laatsch did not depose any of the witnesses disclosed in the County's response to his interrogatories or that Waters named in his deposition—including County Highway Superintendent

Golterman, Chief Engineer Kaindl, or Village President Healy. In fact, Waters was the sole individual that Laatsch deposed. (4) Laatsch did not attempt to engage an expert until 1992, when he contacted Berg. (5) Laatsch did not obtain data regarding the other accidents that had occurred at the Kedzie curve. (6) He did not attempt to ascertain whether the signs that the County had installed at the curve in 1984-1985, partly in response to Olympia Fields' resolution, had affected the accident rate and/or addressed the concerns that had prompted the Village to pass the resolution. (7) He failed to respond to the interrogatories that the County had issued, and he did not comply with the state court's order to identify the witnesses who might testify on Mihailovich's behalf at trial.

Mihailovich's case against the County proceeded languorously toward a trial date. The case was initially set for trial in September 1992. Having contacted Berg in June of that year and having been unable to obtain from him an opinion regarding the curve that would have been helpful to Mihailovich's case, Laatsch opted to voluntarily dismiss the suit when it was called for trial. He refiled it the following year. However, Laatsch engaged in no further discovery after the case was restored to the court's docket. Neither did he inform Mihailovich that he had dismissed and then refiled the suit. On March 11, 1997, Laatsch appeared in court for a case management conference and informed the judge that "extensive discovery" had been completed and that Mihailovich would probably have an expert witness testify at trial. Tr. 419. When the judge suggested a trial date of January 13, 1998, Laatsch replied, "That will be fine." Tr. 420. The court entered an order giving Laatsch until June 9, 1997, to disclose his witnesses. Laatsch never filed a list of witnesses, however, and in December 1997, the County moved to bar Mihailovich from calling any witnesses to testify. In re-

sponse, Laatsch moved to continue the trial date. On December 16, 1997, the court granted the latter motion and struck the trial date.

Approximately two weeks after the court cancelled the January 1998 trial date, Laatsch moved to withdraw from the case. For nearly a year prior to Laatsch's motion, Mihailovich and her son had been dissatisfied with the progress of her suit and had been searching for someone to replace Laatsch. In February 1997, Mihailovich's son had written Laatsch directing him to send her case file to the Law Offices of Edward Vrdolyak for review. Vrdolyak's firm had declined to take the case, however. Two other firms—Ross & Hardies and Corboy & Demetrio—had likewise turned the case down. On January 27, 1998, the court granted Laatsch's motion to withdraw and gave Mihailovich forty-five days in which to retain new counsel. The trial date was re-set to July 22, 1998.

In April or May of 1998, attorney Marc McKenna agreed to assume representation of Mihailovich provided that the court would agree to postpone the trial date further (beyond July). When McKenna received the Mihailovich case file from Laatsch, it included only the police report describing the accident, a videotape of the roadway, some photographs of the accident scene, some printouts of information from the County (the contents of which he couldn't recall), and two depositions—those of Mihailovich and a County employee (presumably Daniel Waters). McKenna twice sought a continuance from the court and was twice denied one. The court did grant McKenna additional time to disclose Mihailovich's witnesses, including any experts who might testify on her behalf. McKenna contacted two experts hoping to obtain an opinion as to the condition of the Kedzie curve and whether it contributed to the Mihailovich accident, but neither individual was able to form an opinion based on the limited materials McKenna could provide from the case file. McKenna thus found

himself with no experts to name, and as for other witnesses, he would later testify that he did not know whom to disclose. He conceded on cross-examination, however, that he could at least have named Mihailovich, her physician, and County employee Waters. In any event, when McKenna failed to name anyone, the County renewed its motion to bar Mihailovich from presenting any witnesses at trial. The court granted that motion on July 8, 1998. That order in essence left Mihailovich with no evidence to present in support of her claim, and, accordingly, on July 24, 1998, the court entered summary judgment against Mihailovich on the County's motion.

The following year, Mihailovich filed the instant suit against Laatsch and the law firm of Pavalon, Gifford, Laatsch & Marino for legal malpractice. Mihailovich contended, in essence, that Laatsch had conducted so little discovery and had so poorly prepared the case for trial that by the time he withdrew, there was little that his successor reasonably could have done to avoid dismissal. At the same time, according to Mihailovich, there was ample evidence available that would have supported her negligence claim against the County. For example, nearly 100 accidents had occurred on the Kedzie curve between 1983 and 1987; and discovery conducted in this case revealed that Olympia Fields officials and County employees, among others, were aware of the high accident rate at the curve and expressed concern well in advance of the Mihailovich accident that the curve was (or might be) unsafe. Moreover, when supplied with additional information about the Kedzie curve, including data regarding the other accidents that had occurred between 1983 and 1987, William Berg—the same expert who had been unable to tell Laatsch whether the curve was defective—opined that the roadway was hazardous and that the condition of the road had contributed to the Mihailovich accident. After reviewing the evidence that Mihailovich had marshaled in

support of her malpractice claim, the district court denied Laatsch's motion for summary judgment (R. 123), and the case proceeded to trial.

At trial, John Lowrey, a personal injury attorney with more than thirty years' experience, testified on Mihailovich's behalf as an expert regarding the standard of care for attorneys handling personal injury cases. Lowrey opined that Laatsch had deviated from that standard of care in a number of respects, including the following: (1) He had failed to properly investigate the Mihailovich accident and ascertain the underlying facts. (2) He had failed to depose the County employees who were responsible for the care and maintenance of the Kedzie curve. He had not deposed anyone named in the County's answer to the interrogatories he had propounded other than Waters, nor had he pursued the leads that Waters himself had supplied in his deposition. (3) He had failed to speak to Olympia Fields officials about the circumstances that led them to pass the 1984 resolution. Village president Healy, for example, "would have been a gold mine," in Lowrey's view. Tr. 449. (4) Laatsch had failed to engage a highway expert early on in the discovery phase of the case, not simply to supply him with an opinion as to the state of the Kedzie curve but also to help him identify the information necessary in order to render such an opinion. Although Laatsch had contacted Berg, he had not provided Berg with the information that the engineer needed in order to form an opinion about the Kedzie curve. (5) By informing the trial court in March 1997 that the parties had engaged in extensive discovery, Laatsch had misled the court about the actual amount of discovery taken (which was modest). (6) Also in March 1997, Laatsch had acceded to an earlier trial date (January 13, 1998) than Laatsch's level of preparation warranted. (7) He had allowed discovery deadlines to pass without disclosing Mihailovich's witnesses. (8) Laatsch had with-

drawn from the case in January 1998, eleven years into the litigation, with the trial date fast approaching and the case file in a state of disrepair.

Lowrey also opined, based on a review of the depositions of Village President Healy, Village trustee Field, Village police chief Unger, County engineer Reno, Harry Abbott, the County Highway Department's Chief Engineer of Design, and other witnesses, as well as the Olympia Fields resolution regarding the Kedzie curve, the available information regarding the Mihailovich accident, and records of the accidents that had occurred at the Kedzie curve, that Mihailovich's negligence suit against the County was a winnable case.

In an effort to show that Mihailovich would not have won her suit against the County even if Laatsch had taken the steps that Mihailovich's legal expert criticized him for not taking, Laatsch presented the testimony of accident reconstructionist Kenneth Baker. Baker had reviewed the plans for the construction of the Kedzie curve in the early 1970s as well as the specifications for the Chevrolet Nomad that the Mihailoviches were driving at the time of the accident, and he had entered the pertinent data from both into a computer simulation program designed to recreate electronically the conditions at the time of the accident. Based on his study and the results of the simulation, Baker opined that there were no defects in the design of the Kedzie curve. Baker admitted, however, that his knowledge of the actual condition of the curve at the time of the accident was limited. He had not inspected the scene of the accident, he could not describe the condition of the pavement at the time of the accident, he had not reviewed any of the internal correspondence between County employees regarding the condition of the curve, and he did not know whether the surface of the curve was highly polished and what its properties were with respect to the retention of water. Baker also acknowledged that the

coefficients of friction he had assigned to the curve for purposes of his review might have been inconsistent with the true condition of the curve. He further allowed that if the pavement of the curve allowed oil to rise to its surface when wet, the actual coefficient of friction at the time of the accident might well have been lower (and the surface thus more slippery) than he had assumed. Tr. 735.

At the conclusion of the trial, the jury returned a general verdict in Laatsch's favor, precipitating this appeal.

II.

Under Illinois law, in order to prevail on a claim of attorney malpractice, a plaintiff must succeed in proving four elements: (1) an attorney-client relationship giving rise to a duty on the attorney's part; (2) a negligent act or omission by the attorney amounting to a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages. *E.g.*, *Woidtke v. St. Clair County, Ill.*, 335 F.3d 558, 562 (7th Cir. 2003) (Illinois law); *Cleveland v. Rotman*, 297 F.3d 569, 572 (7th Cir. 2002) (Illinois law); *Mitchell v. Schain, Fursel & Burney, Ltd.*, 773 N.E.2d 1192, 1193-94 (Ill. App. Ct. 2002). These elements effectively demand that the malpractice plaintiff present two cases, one showing that her attorney performed negligently, and a second or predicate "case within a case" showing that she had a meritorious claim that she lost due to her attorney's negligence. *E.g.*, *Ignarski v. Norbut*, 648 N.E.2d 285, 289 (Ill. App. Ct. 1995); *Sheppard v. Krol*, 578 N.E.2d 212, 214 (Ill. App. Ct. 1991); *Claire Assocs. v. Pontikes*, 502 N.E.2d 1186, 1190 (Ill. App. Ct. 1986).

> Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no

> malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence.

Ignarski, 648 N.E.2d at 288 (citations omitted).

Laatsch, of course, was no longer representing Mihailovich when the Illinois court entered orders barring her from presenting any witnesses and then granting summary judgment in favor of the County; by that time McKenna had stepped into the case. However, in cases of successive representation, Illinois law recognizes that a prior attorney's negligence may be the proximate cause of a plaintiff's damages where the plaintiff's underlying claim is no longer viable when his representation ends. *See Mitchell*, 773 N.E.2d at 1194-95. As noted, this is Mihailovich's theory here. By the time Laatsch withdrew from the case, she asserts, her claim against the County was no longer viable given a trial date six months' hence and the minimal degree to which Laatsch had prepared the case for trial.

As our summary of the testimony above reveals, much of the trial was devoted to the merits of Mihailovich's negligence claim against the County—the "case within a case" whose meritorious nature Mihailovich had to establish in order to prevail on her malpractice claim against Laatsch. Indeed, all of the issues that Mihailovich has raised on appeal relate to her efforts to prove that aspect of her malpractice claim. In briefing those issues, both parties have assumed that Mihailovich presented sufficient evidence as to the other elements of the claim, including proof that Laatsch breached the duty of care that

he owed Mihailovich as her attorney. Having thoroughly reviewed the record, we agree that Mihailovich presented evidence adequate to support a jury finding on that point and the other elements of her malpractice claim. Because the jury rendered a general verdict in Laatsch's favor, we must therefore assume that it might have found against Mihailovich based solely on her failure to show convincingly that she had a meritorious claim against the County and had lost that claim due to Laatsch's alleged negligence. Any error that prejudicially interfered with Mihailovich's ability to prove that aspect of her malpractice case would therefore require a new trial. We thus turn our attention to the first and primary issue she has raised on appeal, which concerns the district court's decision to exclude all evidence of other accidents that had occurred at the Kedzie curve. Because we conclude that the district court erred in excluding that evidence and that a new trial is warranted on that basis, we need not resolve the other issues Mihailovich has presented. *See* Fed. R. Civ. P. 61. We shall, however, devote some attention at the conclusion of our opinion to the exclusion of Mihailovich's proffered expert testimony, a matter that we believe warrants reconsideration on remand.

A. Exclusion of Other Accidents

As we have noted, the district court granted Laatsch's motion *in limine* to exclude all evidence regarding other accidents at the Kedzie curve. *See* Tr. 247-48, 685-88. Mihailovich's purpose in offering that evidence was to establish that the curve was dangerous when wet. Tr. 685. But in the court's view, there was already ample evidence in the record establishing that the surface of the curve became slick when wet, including testimony that the County itself had installed a "Slippery When Wet"sign at the curve in 1984-85 to warn motorists of that condition.

Tr. 686. Indeed, this was a common-sense proposition that the jury was likely to appreciate without such evidence. Tr. 685-86. Therefore, the court viewed the probative worth of the other-accidents evidence as "minuscule to say the least." Tr. 685. At the same time, looking to this court's decision in *Kelsay v. Consolidated Rail Corp.*, 749 F.2d 437, 442-46 (7th Cir. 1984), the court saw a significant potential for undue prejudice in this evidence. By her own admission, Mihailovich was not contending that the condition of the roadway was the sole cause of all other accidents at the curve; and the variables that might have contributed to those other accidents (including the direction of travel, weather, speed, vehicle weight, seasonal conditions, and other traffic) were "almost infinite." Tr. 687. The potential for a collateral trial to occur as to the causes of those accidents thus struck the district court as substantial. Tr. 687-88. Finally, in the absence of evidence that any of the motorists involved in the other incidents had filed suit against the County, the court found no reason to believe that those accidents bespoke negligence on the County's part. Tr. 688.

Although relevant evidence is presumptively admissible, *see* Fed. R. Evid. 402, a court has the authority to exclude it if the risks posed by the introduction of the evidence significantly outweigh its probative worth.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Rule 403 thus calls upon the district court to weigh the need for and probative value of the evidence against potential harm that its admission might cause. *Id.*, Advisory Committee Note (1972); *see also, e.g.*,

Manuel v. City of Chicago, 335 F.3d 592, 596 (7th Cir. 2003). " 'The balancing of probative value and prejudice is a highly discretionary assessment, and we accord the district court's decision great deference, only disturbing it if no reasonable person could agree with the ruling.' " *Id.*, quoting *United States v. Thomas*, 321 F.3d 627, 630 (7th Cir. 2003).

In order to show that she would have won her suit against the County but for Laatsch's alleged malpractice, Mihailovich had to prove that the County, which was responsible for maintaining the Kedzie curve in a reasonably safe condition for its normal and intended uses, negligently discharged that responsibility. *See generally DiBenedetto v. Flora Tp.*, 605 N.E.2d 571, 574 (Ill. 1992); *First Nat'l Bank in DeKalb v. City of Aurora*, 373 N.E.2d 1326, 1331 (Ill. 1978); 745 Ill. Comp. Stat. 10/3-102, 10/3-105; *see also, e.g., Storen v. City of Chicago*, 27 N.E.2d 53, 55 (Ill. 1940); *Santelli v. City of Chicago*, 584 N.E.2d 456, 459 (Ill. App. Ct. 1991). Her theory in relevant part was that years of wear had polished the surface of the Kedzie curve, so that when precipitation dampened the pavement and oil rose to its surface, the pavement became extremely slick; thus, by failing to make appropriate repairs or changes to the road, notwithstanding requests that it do so, the County had permitted a hazard to arise and persist that caused motorists to lose control of their vehicles when the pavement was wet. *See, e.g.*, Tr. 771, 813.

In this context, there is no doubting that the other accidents proffered were relevant to establish that the worn pavement of the curve constituted a hazard for motorists. If, as Mihailovich theorized, the Kedzie curve was dangerous and had been for some time, then one would naturally expect there to have been other accidents besides hers over the years. In fact, as the record in this case reveals, the number of accidents that occur at a particular location is

one of the first indicators that officials concerned with roadway safety look to for an indication that the location is dangerous.

We know, of course, from the proffers of excluded testimony that the reason why the Olympia Fields board of trustees passed the 1984 resolution calling on the County to address the curve was the high number of accidents that had occurred at that curve; employees of the County's Highway Department themselves had cited the high accident rate in calling for studies of the curve in 1983, more than a year before the Olympia Fields board passed its resolution.

More than this, the frequency with which accidents occur would appear to be an accepted reference point in civil engineering for the purpose of identifying potentially hazardous roadway locations. The February 21, 2001 report of civil engineer Paul Box, which Mihailovich submitted in opposition to Laatsch's motion to exclude the evidence of prior accidents, noted that although there is no national standard as to the number of accidents necessary in order to label a particular location as "hazardous," experts in the field had conducted research and developed a graph indicating that the occurrence of more than two accidents over a period of three years signaled that the location was "hazardous," while the occurrence of more than ten accidents in three years indicated that it was "very hazardous." R. 105, Box Report at 6 ¶ 18, citing J.I. Taylor and H.T. Thompson, *Determining Hazardousness of Spot Locations*, Transportation Research Record 630 (1977); *see also* J.I. Taylor and H.T. Thompson, Federal Highway Administration, *Identification of Hazardous Locations*, Report Nos. FHWA-RD-77-81 through 83 (1977) (identifying accident rate as among factors relevant to hazardousness of particular location). Assuming that Box has correctly interpreted and applied this criterion, the total of ninety-four accidents that occurred at the Kedzie curve in

the four and one-half years surrounding the Mihailovich accident obviously would exceed the Taylor & Thompson threshold for a "very hazardous" location by many multiples. If the frequency of accidents at a particular location constitutes a category of data that both experts in civil engineering and officials charged with the maintenance of roadways consider important, then that information would be highly relevant to the jury's own assessment of whether or not the curve posed a hazard.[9]

Indeed, our own precedents recognize that other accidents are generally deemed admissible both to prove the existence of a defect or danger in a location or a product and to show that the defendant had notice of the defect or danger, so long as the other accidents are "substantially similar" to the accident at issue in the litigation. *Weir v. Crown Equip. Corp.*, 217 F.3d 453, 457 (7th Cir. 2000); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1185 (7th Cir. 1992); *Estate of Carey by Carey v. Hy-Temp Mfg., Inc.*, 929 F.2d 1229, 1235 n.2 (7th Cir. 1991); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988); *see also Walker v. Trico Mfg. Co.*, 487 F.2d 595, 599 (7th Cir. 1973);

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[9] It appears that the data regarding other accidents at the Kedzie curve played a role in changing Box's mind as to whether or not the curve was hazardous at the time of the Mihailovich accident. Box was one of the two experts that attorney McKenna had contacted in 1998 when he provisionally took over the representation of Mihailovich in her suit against the County. Based on the information that McKenna provided, which did not include any information about the other accidents that had occurred at the curve, Box told McKenna that Mihailovich had "no case." Tr. 296-97. Later, in the course of the instant malpractice suit, Box was supplied with much more information about the history of the Kedzie curve, including the other accidents that had occurred there. Based on the more expansive information with which he was provided, Box concluded that the curve was dangerous at the time of the Mihailovich accident. R. 105, Box Report at 6-7.

Lever Bros. Co. v. Atlas Assur. Co., 131 F.2d 770, 777 (7th Cir. 1942). Where, as here, the other accidents are offered as proof of a dangerous condition,[10] courts insist on a greater degree of similarity between those accidents and the one at issue than they do when the other incidents are offered solely to establish notice of a potential danger to the defendant. *Nachtsheim*, 847 F.2d at 1268 n.9. This is not to say, however, that the accidents must correspond with one another in every detail. "In applying this standard, we have emphasized that 'substantially similar' does not mean 'identical,' and that the range between similar and identical is a matter to be addressed on cross-examination." *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994), citing *Carey*, 929 F.2d at 1235 n.2. The particular defect or danger alleged by the plaintiff will serve to define the degree of commonality that there must be among the accidents in order for them to be considered substantially similar. *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986). Looking to the established facts underlying both the plaintiff's accident and the other accidents she has proffered, the court must consider whether those facts reasonably support an inference that all of the accidents share a common cause—i.e., the danger that the plaintiff has alleged. *See Nachtsheim*, 847 F.2d at 1269. If the facts do support such an inference, then the other accidents are admissible barring other factors suggesting that their admission will result in undue prejudice. *See id.*

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[10] Evidence of other accidents arguably could have served as proof that the County was on notice of the alleged hazard. However, Mihailovich did not offer the evidence for that purpose. In any case, there was other evidence in the record establishing that the County was on notice, including the Village's 1984 resolution and the County Highway Department's own internal investigation into the safety of the curve.

Laatsch suggests at the outset that Mihailovich did not make enough of a record regarding the other accidents at the Kedzie curve to show substantial similarity between those accidents and her own, but we disagree. The record before us includes a year-by-year tabulation, prepared by Unger, then the chief of police of Olympia Fields, of the accidents that had occurred at the Kedzie curve from January 1, 1983 through July 15, 1987;[11] police reports for some (but by no means all) of the accidents that had occurred at the curve in 1981 through 1986; and the compilations and analyses of the accident data reflected in the reports of both Box and Berg. Mihailovich cited and presented this information to the district court prior to trial, both in opposing (successfully) Laatsch's motion for summary judgment and in opposing (unsuccessfully) the County's motion *in limine* to exclude evidence concerning the other accidents. *See, e.g.*, R. 62 (Plaintiff's Local Rule 56.1 Statement of Undisputed Material Facts) Exs. 6 (Berg Report), 24 (Kedzie curve accident data); R. 105 (Plaintiff's Response to Defendant's Motion In Limine No. 2) Attachment (Box Report). The police reports for some of the accidents that occurred at the curve in 1981 through 1986 were attached to Mihailovich's malpractice complaint. R. 1 Ex. J. Collectively, this data, coupled with the other evidence of record, tends to show that: (1) the other accidents occurred along the Kedzie curve; (2) they occurred relatively close in time to the Mihailovich accident; (3) the condition of the curve was no different at the time of the Mihailovich accident than it was at the time of the other accidents (the curve itself had not been resurfaced since the 1970s, and would not be

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[11] So long as they satisfy the criterion of substantial similarity, accidents that occurred after as well as before the plaintiff's accident are admissible to prove the existence of a danger. *Ross*, 977 F.2d at 1185; *Nachtsheim*, 847 F.2d at 1268 n.8.

resurfaced until 1988 or 1989); (4) a majority of the accidents (roughly three-quarters of the total from 1983 through mid-July 1987) occurred on wet pavement, just as the Mihailovich accident did; and (5) although the police reports (and Berg's analysis of the reports for twenty-four of the twenty-nine accidents that occurred in the eighteen months immediately prior to the Mihailovich accident) reveal variations in precisely where each vehicle left the roadway and what happened as a result (for example, some vehicles collided with oncoming traffic, while others came to rest on either side of the roadway), the reports reveal a pattern of drivers losing control of their vehicles while on the curve, particularly when the roadway was wet.

Keeping in mind the particular danger that Mihailovich has alleged was present at the curve—excessive slipperiness when the pavement was wet—we are satisfied that the other accidents are substantially similar to the Mihailovich accident and therefore are admissible as proof that the curve posed a hazard to motorists. We readily grant Laatsch's point that there is a great deal that the record does not tell us about these accidents. The gross accident data compiled by Unger, for example, reveals only the date and time that each accident occurred, the number of vehicles involved, whether the accident resulted in a fatality, injury, or property damage, the weather conditions at the time of the accident, and the condition of the road surface. *See* R. 62 Ex. 24. Although Unger's compilation was apparently derived from police reports regarding these accidents (the compilation lists a report number for each incident), the record before us does not include all of these reports. The thirty-five or so police reports attached to the complaint reveal a good deal more information about those accidents, including in particular the basic facts of each accident, and also the identities of the motorists involved, the types of vehicles they were driving, where the

accident occurred, whether alcohol was involved, the apparent physical condition of the motorists, and so forth. But the reports do not recount precisely what each driver was doing immediately before the accident occurred (how fast he was driving, for example, whether and how he applied his brakes, and so forth), they do not establish with precision where along the S-curve each incident took place, and they do not purport to assign fault for the accident or to identify each of the factors that may have contributed. Even so, the data do reveal a distinct pattern to the other accidents: they occurred at an average rate of twenty per year in the four and one-half years surrounding the Mihailovich accident (January 1983 through mid-July 1987); a substantial majority (at least seventy-five percent) occurred when the pavement was wet; and (per the police reports) they almost uniformly involved a loss of control by a driver with the result that the vehicle slid, spun, or skidded into a vehicle proceeding in the opposite direction, into a vehicle stopped directly ahead of him, or off the road altogether. Berg's analysis also indicates that in twenty-one of the twenty-four accidents occurring the eighteen months prior to the Mihailovich accident for which records were available, the subject vehicle had been proceeding southbound into the S-curve. Given the frequency and regularity with which motorists, and in particular southbound motorists, were losing control of their vehicles at the curve when the pavement was wet, it is a fair inference that both the condition of the curve's pavement when wet and the nature of the southbound approach to the curve, played some role in these other accidents. The same inference can be drawn from what we know about the Mihailovich accident: it involved a southbound motorist, it occurred on the curve, when the pavement was wet, and it involved a loss of control that resulted in the van leaving the road. In these respects, the other accidents may be deemed substantially similar to the Mihailovich accident. Evidence concerning the other accidents was therefore

admissible, barring a reason which would have justified its exclusion under Rule 403.

As our summary of the district court's rationale for excluding the other accidents indicates, the court had two basic concerns: it saw the probative worth of evidence concerning the other accidents as minimal, while the potential for prejudice in such evidence to be great. As we explain below, the court was off-base in its first concern, and in articulating its second concern, the court appears to have been led astray by our fact-specific holding in *Kelsay*.

In weighing the probative value of the evidence, the district court described the relevance of the prior accidents as "minuscule" (Tr. 685), reasoning that other evidence amply established that the surface of the Kedzie curve was slippery when wet and that jurors in any event would have appreciated that fact as a matter of common sense. In that observation, the court was mistaken. Mihailovich's theory as to the hazard posed by the curve was not simply that it was slippery when wet, but that it was unusually and dangerously so, i.e., to a degree that motorists would not ordinarily anticipate. That so many other accidents occurred on the curve, and that approximately three-quarters of them occurred when the pavement was wet, lends support to the notion that the curve was unreasonably slick when wet. Indeed, the fact that the accidents continued unabated even after the County installed a "Slippery When Wet" advisory sign at the curve in 1984 might be construed as an indication that the degree of slipperiness exceeded even the expectations of motorists who were placed on notice of the potential hazard. The reaction of local officials to the history of accidents occurring at the curve likewise could be construed as a sign that the degree of danger was unusual.

Indeed, we must point out that, in view of the factual backdrop of the case, proof of the other accidents that occurred on the curve was one of the few ways in which

Mihailovich could have established that the roadway was in an unreasonably dangerous condition. A more direct way of proving the supposed hazard would have been to measure objectively the slipperiness of the pavement, as by ascertaining the coefficient of friction on the surface of the curve when it was wet. But that was no longer possible by the time Laatsch withdrew from representing Mihailovich—the curve had been reconstructed and resurfaced between 1988 and 1989, and Laatsch had not engaged an expert to inspect the curve and conduct appropriate testing to determine the coefficient of friction prior to that time. So Mihailovich had to pursue more indirect ways of establishing the alleged hazard. The jury of course knew that the Olympia Fields trustees believed the curve to be hazardous and that they had conveyed that concern to the County by way of the 1984 resolution. But the district court permitted the jury to consider that resolution solely as proof that the County had notice of a potential hazard, not as proof that the roadway was, in fact, dangerous. Tr. 233. Beyond this, the jury heard only abbreviated testimony that the surface of the roadway had a tendency to become oily and slick when wet. Consequently, there was little, if any, evidence indicating whether or not the surface of the Kedzie curve in fact became unusually or dangerously slippery when wet and what effect the wet surface had upon motorists who negotiated the curve. Not surprisingly, this was a point that Laatsch's counsel seized upon in his closing argument to the jury. *E.g.*, Tr. 795.

So, when it engaged in the Rule 403 balancing process, the court did not give the other-accidents evidence the weight it deserved in terms of its probative value. At the same time, on the other side of the scale, the court in assessing the potential reasons for excluding the evidence did not properly focus on the key consideration, which is substantial similarity between the other accidents and the

one at issue in this case. Instead, referencing our opinion in *Kelsay* as its primary guidepost, the court found that the justifications that *Kelsay* cited for the exclusion of other-accident evidence in that case also weighed in favor of exclusion here.

But our decision in *Kelsay* does not mandate the exclusion of the other-accident evidence tendered here. *Kelsay*, which involved the collision of a train with an automobile at a railroad crossing, affirmed (over a dissent) the district court's decision to exclude evidence of two fatal accidents that had occurred at the same crossing twelve and thirty years earlier. We cited four factors that in our view supported the exclusion of the prior-accident evidence: (1) key differences in the conditions and circumstances of the prior accidents, (2) the absence of evidence that lawsuits had been filed on behalf of the deceased motorists in the prior accidents, which suggested that the drivers themselves may have been at fault, (3) the danger that the jury might infer from the prior accidents alone that the railroad crossing at issue was hazardous, and (4) the plaintiff's ability to show through other evidence that the conditions at the crossing had remained unchanged for a number of years, so that the potential danger would have been evident to the railroad. 749 F.2d at 443. Nothing in our opinion suggested that this was an exhaustive list of pertinent considerations or that the factors we identified would apply with the same force in any case involving other-accident evidence. It bears mentioning in that regard that we had first identified these factors in *Gardner v. Southern Ry. Sys.*, 675 F.2d 949, 952 (7th Cir. 1982), as being among the "many factors" that the district judge "undoubtedly" had considered in excluding other-accident evidence; *Gardner* itself did not cite any precedents that focused on these factors. The governing standard, however, as cases both before and after *Gardner* and *Kelsay* make clear, was and is whether the other accidents are substantially

similar to the accident at issue in the instant suit. *See, e.g., Buscaglia*, 25 F.3d at 533; *Carey*, 929 F.2d at 1235 n.2; *Walker*, 487 F.2d at 599; *Lever Bros.*, 131 F.2d at 777.

Moreover, *Kelsay* involved a materially distinct set of circumstances. First, the prior accidents involved in that case were, as the court noted, quite remote in time from the incident under litigation, and in each case there was at least one apparent circumstance suggesting that something other than the hazardous nature of the railroad crossing was at fault. In one of the instances, the windows of the car had been heavily soaped, which obviously would have interfered with the driver's view of the crossing; and in the other instance, the motorist had arrived at the crossing *after* the train did, suggesting that the driver's view of the crossing and the oncoming train was not a cause of the collision. By contrast, the accidents that Mihailovich sought to introduce occurred with regularity in the years just before and just after her accident, with no grossly apparent distinctions that would explain away the condition of the roadway as a cause of those accidents.

Second, the prior accidents involved in *Kelsay* had both resulted in fatalities, so the lack of evidence that lawsuits had been filed in those cases was more telling than it would be here, where the vast majority of the other accidents did not result in deaths. As litigious as Americans may be, one cannot reasonably expect every motorist who loses control of her car on a slippery road to file a lawsuit. Moreover, whether or not another accident resulted in litigation really is of very limited use in weighing the probative value of that accident. As Judge Posner pointed out in his dissent in *Kelsay*, the question with respect to other accidents is not whose fault they were in a legal sense but what they can tell the jury about the dangerousness of the location where they occurred. 749 F.2d at 451 (Posner, J., dissenting).

Third, although it is quite possible that a jury might infer from the prior accidents themselves that the Kedzie curve was in fact dangerous, that inference would not be as inappropriate as it might have been in *Kelsay*. The other accidents proffered here, which are neither isolated nor remote in time from the Mihailovich accident, fall into a pattern suggesting that the Kedzie curve indeed did become dangerously slippery when wet. That is an inference that the Village and some County employees themselves drew from the pattern, and it is also an inference that at least two experts in the field, Box and Berg, drew from a review of the evidence. In Box's view, for example, the fact that a distinct majority of the reported accidents occurred on wet pavement "represents an extremely unusual circumstance" that pointed to the need for the pavement to be addressed by the County. R. 105, Box Report at 7 ¶ 5. Moreover, it appears that when the curve was reconstructed in 1988-1989, the accident rate dropped dramatically to at most a few accidents per year. Although the district court excluded evidence concerning the reconstruction pursuant to Fed. R. Evid. 407—and we assume that it did so correctly—the impact that the reconstruction had on the occurrence of accidents nonetheless is something that we may consider in determining whether or not the court abused its discretion in excluding evidence of other accidents. The noteworthy reduction in the number of accidents following reconstruction tends to confirm that the prior condition of the curve in fact *did* have something to do with the accidents that occurred there. All of this indicates that evidence concerning the other accidents would not have been unduly prejudicial in the sense that it might have led the jury to draw unwarranted inferences from those accidents about the condition of the curve.

Fourth, although exclusion of the other-accidents evidence did not prevent Mihailovich from proving that the condition of the Kedzie curve had been evident for some

time prior to her accident—such that the County was on notice of the potential danger—that is really beside the point. Mihailovich, as the district court recognized, was not seeking to introduce the evidence for purposes of notice, but to prove that the pavement of the curve was dangerously slippery when wet. Almost none of the evidence that was admitted by the court in this case went to that important point. Exclusion of the other-accidents evidence deprived Mihailovich of highly probative proof of the condition of the curve and its impact on motorists.

The district court found it noteworthy that Mihailovich, by her own admission, was not asserting that the condition of the roadway was necessarily the *sole* cause of the other accidents and that the number of other variables that might have contributed to the other accidents—including the direction of the vehicle, the weather, the speed, vehicle weight, seasonal conditions, and other traffic—was "almost infinite." Tr. 687. That the condition of the curve was not necessarily the sole cause of the other accidents was an entirely reasonable and prudent concession for Mihailovich to make, given that the available data concerning those accidents (including the police reports) do not undertake to assign and/or apportion fault or causation. But so long as the evidence regarding those accidents reasonably supports the inference that the condition of the roadway was at least *a* cause of those accidents—and we believe it does—then they remain probative of whether the road was unreasonably hazardous and whether the condition of the road was a cause of the Mihailovich accident as well. Likewise, the number of variables that might have contributed to the other accidents does not demand their exclusion. The standard for admission, as we have pointed out, is not identity or near identity but substantial similarity. We are satisfied that the record reveals the other accidents to have been substantially similar to the Mihailovich accident. Laatsch would certainly be free to highlight for

the jury the potential differences in the types of variables that the district court cited, but those differences go to the weight of the other-accidents evidence rather than its admissibility.

Finally, although the district court was (rightly) concerned about the potential for testimony regarding the other accidents to devolve into a collateral trial over the circumstances in those accidents, there are alternatives to exclusion of any and all evidence about those accidents that would suffice to avoid this peril. The occurrence of other accidents at the curve, and the range of circumstances that might have caused them, is not so complex a subject as to require an overly expansive evidentiary record. Mihailovich could establish the pertinent facts regarding these accidents without delving deeply into the circumstances of each occurrence, and Laatsch similarly could identify the potential distinctions between those accidents and the Mihailovich accident as well as the types of conditions besides the road surface that might have contributed to the other accidents without having to litigate who was at fault in each instance. As always, the court remains free to establish reasonable limits on this line of inquiry in order to prevent it from becoming a sideshow.

Although, for all of these reasons, we conclude that the district court abused its discretion in excluding all evidence regarding other accidents at the Kedzie curve, we must also consider whether the error was prejudicial. Pursuant to Federal Rule of Civil Procedure 61, an error in the admission or exclusion of evidence does not supply a basis for setting aside a verdict unless the error was "inconsistent with substantial justice." "Our cases hold that 'evidentiary errors satisfy this standard only if a significant chance exists that they affected the outcome of the trial.'" *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 611 (7th Cir. 2002), quoting *Hasham v. Cal. State Bd. of*

Equalization, 200 F.3d 1035, 1048 (7th Cir. 2000); *see also Harris v. City of Chicago*, 266 F.3d 750, 755 (7th Cir. 2001).

In this case, we believe that there is a significant chance that the exclusion of the other-accident evidence affected the outcome of the trial. In order to prove her "case within a case"—i.e., that she would have prevailed on her claim against the County but for Laatsch's alleged negligence—Mihailovich was required to present evidence that the Kedzie curve was dangerous. As we have explained, the most direct method of establishing the hazard—having an expert inspect the curve and conduct tests to determine the condition of its pavement when wet—was foreclosed to her. The Kedzie curve as it was at the time of the Mihailovich accident in 1986 no longer exists; it was reconstructed in 1988-1989, ten years before she filed the instant suit. During the time that Laatsch represented Mihailovich prior to the reconstruction, he did not cause any testing or inspections to be done that might have preserved data about the coefficient of friction on the curve's pavement when wet. So Mihailovich was confined to indirect means of proving that the curve was dangerous. Primary among these methods was proof that other accidents occurred regularly at the curve when the pavement was wet. Barred from introducing *any* evidence regarding such accidents, Mihailovich was left solely with proof that Village officials and County employees perceived the curve to be a potential hazard and no explanation as to why they held that perception. Had the jury known that both the Village and some employees of the County perceived the curve to be dangerous because motorists were regularly losing control of their vehicles when the pavement was wet, it might well have assessed her prospects of prevailing against the County differently.

We therefore conclude that Mihailovich is entitled to a new trial at which she may introduce proof of the other

accidents that occurred at the Kedzie curve. The district court, of course, remains free to establish reasonable limits on the type and extent of other-accident evidence that Mihailovich may introduce. For example, to the extent that police reports reveal at least the rudimentary details about each accident, and in that way permit the parties to establish points of comparison with the Mihailovich accident, the court might decide to permit evidence solely regarding those accidents for which such reports are available.[12] We also wish to reiterate that the admission of this line of evidence need not portend a mini-trial as to each and every one of the other accidents. Mihailovich may present data regarding the number and basic nature of these accidents, and Laatsch may identify the limits of the facts known about those accidents, the distinctions between those accidents and the Mihailovich accident, and the range of circumstances other than the condition of the curve that might account for those accidents, without inquiry into this area becoming unduly prolonged.

B. Exclusion of Expert Testimony by Berg

In advance of trial, Laatsch moved to bar William Berg from testifying as an expert pursuant to Fed. R. Evid. 702. Mihailovich had identified Berg as a civil engineer from whom she intended to elicit testimony as to, among other things, the condition of the Kedzie curve at the time of the accident, the County's asserted negligence in maintaining the curve, and the likely cause of the Mihailovich accident. Having reviewed a report summarizing Berg's opinions on these subjects and having deposed him on multiple occasions, Laatsch contended that Berg should not be

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[12] As we have noted, the appellate record contains only an incomplete set of police records. But we assume that additional records may be available to the parties.

permitted to testify because his analytical methodology did not satisfy the requirements outlined in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999).

Berg expressed three basic opinions with respect to the condition of the Kedzie curve at the time of the Mihailovich accident and the cause of that accident. In sum, Berg opined: (1) The County was not maintaining the Kedzie curve in a reasonably safe condition as of July 1, 1986. (2) The hazardous nature of the curve resulted in part from the widening and resurfacing of Kedzie Avenue to the north of the S-curve in 1981. As a result of that project, southbound motorists were approaching the curve at speeds greater than the advisory speed of thirty miles per hour for the curve itself and were engaging in frequent applications of their brakes after they entered the curve. The higher speeds and more frequent brake applications resulted in a higher frictional demand in the curve. When coupled with low or reduced skid resistance in the curve when the pavement was wet, this posed a safety hazard to motorists. (3) The configuration of both the S-curve itself as well as the southbound approach to the curve were substantial causal factors of the Mihailovich accident. The prevailing conditions at the time of the accident and the sequence of events were substantially similar to the continuing pattern of wet-pavement accidents involving southbound vehicles. *See* R. 109 Ex. B; Tr. 620-21.

Berg, a civil engineer, employed a "human factors" model in reaching these conclusions. Broadly speaking, a human factors analysis focuses on the interaction between human behavior and the design of a machine, product, or in this case, a particular roadway. An expert engaging in such an analysis will consider whether, in light of predictable human behavior, the design or condition of the subject item poses a potential hazard. *See, e.g.*, Richard J.

Kholmn, *Using the Human Factors Expert in Civil Litigation*, 40 AM. JUR. TRIALS 329 §§ 1-2. Berg's opinions reflect this approach to the extent they incorporate certain notions about how motorists likely would have been behaving as they entered the Kedzie curve as it existed at the time of the Mihailovich accident.

One of the key assumptions underlying Berg's analysis is that southbound motorists typically would have entered the curve at speeds of between thirty-five and forty-five miles per hour. R. 109 Ex. B; R. 62 Ex. 6 at 3 ¶ 6; Tr. 620. That assumption was based on two circumstances. First, the posted speed limit on Kedzie Avenue to the north of the reverse curve was forty-five miles per hour. That limit dropped to thirty-five miles per hour at 203rd Street, or approximately 1700 feet north of the S-curve. *Id.* Second, the 1981-82 widening and resurfacing of Kedzie Avenue to the north of the curve had created a roadway that would cause drivers to feel safer and to drive faster. In short, due to the higher posted speed limit and more commodious roadway immediately to the north of the curve, southbound motorists were likely to be driving at a rate somewhere between thirty-five miles per hour and forty-five miles per hour as they entered the Kedzie curve, through which the advisory speed was thirty miles per hour. *Id.* ¶¶ 6-7; Tr. 626-27.

The curve itself required motorists to adjust both the path and speed of their vehicles. In Berg's view, the location, configuration, and other characteristics of the Kedzie curve gave rise to what he described as an "expectancy violation" and a "detection/recognition" problem for motorists. *Id.*; R. 109 Ex. B ¶ 3; Tr. 620. Berg defined an expectancy violation as an unusual situation that catches the motorist by surprise. Tr. 575-76. He believed that the Kedzie curve posed an expectancy violation for southbound motorists in the sense that it required motorists to suddenly both slow and turn their vehicles after having trav-

eled along a stretch of wide, straight roadway. R. 62 Ex. 6 at 3 ¶ 7. A detection/recognition problem is one that a motorist will have difficulty recognizing. Tr. 576. Berg thought that the Kedize curve also posed this type of problem, because roadside vegetation coupled with a downward grade of 2.5 percent beginning near the middle of the north curve made it difficult for motorists to visualize the location and tightness of the curve. R. 62 Ex. 6 at 3 ¶ 7.

Under these circumstances, Berg explained, motorists required warnings to alert them to the presence and location of the reverse curve, the need to reduce their speed to thirty-five miles per hour or less, and also to the fact that the surface of the curve was slippery when wet. *Id.* at 3 ¶ 8. The need for the latter warning was demonstrated by the pattern of accidents that had occurred on the curve when the pavement was wet. *Id.* at 3 ¶ 4. As we know, following the field studies that the County conducted in 1984 in response to the concerns expressed by its own employees and by the Village of Olympia Fields about the accident rate at the curve, additional signage had been installed to alert motorists to each of these circumstances. In Berg's opinion, those signs were sufficient to provide motorists with the information they needed about those aspects of the curve. *Id.* ¶ 8.

However, accident records for the eighteen-month period beginning in January 1985 (after the additional warning signs were installed) and ending in June 1986 revealed that the wet pavement safety problem continued unabated. Of the twenty-nine accidents reported to have occurred at the curve during that period, twenty-two had taken place on wet pavement and the remaining seven had occurred when the pavement was covered with ice or snow. Based on the police reports available for twenty-four of these accidents, Berg had prepared a collision diagram indicating what had happened to the vehicles involved in these accidents. According to Berg, the diagram demonstrated

a clear pattern: twenty-one of the twenty-four vehicles involved had been proceeding southbound on Kedzie Avenue and, after entering the curve, had either left the roadway on the inside or outside of the curve or had crossed the center line and collided with a northbound vehicle. *Id.* at 3-4 ¶ 9; *see also* Tr. 621-22. Because Berg was relying on the police reports for data about these accidents, he lacked information as to what the driver in each case had done (in particular, whether he or she had applied the vehicle's brakes) at a particular moment. Tr. 576-77. But what the available data made clear to Berg was that in each case the driver had lost control of the vehicle after entering the curve. R. 62 Ex. 6 at 3-4 ¶ 9.

Berg acknowledged that the available information about the Mihailovich accident did not permit him to determine where, precisely, the Mihailovich's van had left the road. Tr. 630-31. But Berg indicated that what was known about the Mihailovich accident placed it "dead center" within the pattern that he discerned in the history of accidents at the curve—that is, the vehicle was proceeding southbound on Kedzie Avenue, the pavement was wet, and the driver lost control of the vehicle after entering the curve. R. 109 Ex. B ¶ 3; Tr. 578, 620, 630.

As we have noted, Berg opined that two factors in combination were the probable cause of this pattern of accidents: (1) low or reduced pavement skid resistance on the curve, and (2) high frictional demand for vehicles traversing the curve. R. 109 Ex. B ¶ 2. Berg surmised that the surface of the curve had low or reduced skid resistance based on the fact that a distinct majority of the accidents occurred when the pavement was wet. Tr. 574-75. He thought that the reduction in skid resistance was likely due either to a polishing of the pavement resulting from a high volume of cornering traffic and/or to the poor drainage of surface water resulting from the low superelevation rate of the curve and the descending 2.5 percent grade. Tr.

584-85.[13] Berg attributed the high frictional demand to the relatively high speeds (thirty-five to forty-five miles per hour) of vehicles approaching the curve, frequent brake applications by motorists after they entered the curve, and the reduced effectiveness of the advisory signs present at the curve. Again, Berg assumed that southbound motorists were likely traveling at a rate of at least thirty-five to forty-five miles per hour on approach to the curve based on the higher speed limit and the wider and straighter roadway on Kedzie Avenue north of the curve. Tr. 626-27. He assumed that frequent brake applications occurred on the curve given that motorists were, by his estimate, approaching the curve at speeds in excess of the advisory speed for the curve itself (thirty miles per hour) and given the sheer number of cars passing through the curve on a daily basis (6,200 cars per day). Tr. 573-74. Finally, he assumed that the warning signs were not as effective as they otherwise might have been because the curve did not appear to pose a problem when dry and because the recommended speed of thirty miles per hour through the curve was not dramatically lower than the speed of thirty-five to forty-five miles per hour at which he believed motorists likely were approaching the curve. *See* R. 62 Ex. 6 at 3-4 ¶¶ 9-10; Tr. 621-22. Consequently, motorists who were used to driving through the curve when it was dry might not have paid as much attention as they should have to the warning signs posted at the curve.

Appropriate countermeasures to address the ongoing wet-pavement safety problem, in Berg's view, would have included applying a skid-resistant pavement overlay within the curve and/or to increase the superelevation of the

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[13] Berg admitted that the actual coefficient of friction on the surface of the curve as of the date of the Mihailovich accident could not be ascertained, because the roadway had since been realigned and repaved. Tr. 624.

curve. In addition, the County might have conducted a speed study of southbound traffic to determine whether there was a need for either additional enforcement of regulatory speed limit or for measures, such as a flashing beacon or rumble strips, to reinforce the warnings that were already in place. *Id.* at 4 ¶ 11; *see also* Tr. 628.

Berg noted that after the Mihailovich accident occurred, the advisory speed through the curve was reduced to twenty-five miles per hour. Yet, accident records for the year following the accident again showed that the wet-pavement problem persisted. R. 62 Ex. 6 at 4 ¶ 12.

What ultimately did solve the problem, Berg noted, was the reconstruction of the curve in 1989. The key aspects of the reconstruction which, to Berg's mind, improved the safety of the curve were a new road surface coupled with a larger curve radius and superelevation at the north curve which reduced frictional demand on the pavement. Berg noted that as a result of these changes, drivers could safely navigate the curve at speeds of up to forty-five miles per hour. *Id.* ¶ 13; Tr. 624-25.

Finally, Berg opined that the County had been negligent in failing to identify and address the root causes of the problem at the Kedzie curve sooner than it did. He indicated that since the 1960s, it has been a standard civil engineering practice to prepare collision diagrams for roadway segments that reflect unusually high frequency of accidents. In his view, the County's Highway Department should have had, but did not have, appropriate procedures in place prior to the Mihailovich accident in order to ensure that collision diagrams were prepared when the circumstances warranted. R. 62 Ex. 6 at 4 ¶ 14. Berg believed that had the County prepared such a diagram for the Kedzie curve in 1983, when the high accident rate for that location was first noticed by County employees, the timetable for identifying the cause of the accidents and for

implementing improvements sufficient to rectify the problem could have been advanced so that those improvements would have been made prior to the Mihailovich accident in 1986. Had the curve been reconstructed prior to July 1, 1986 as it later was in 1989, for example, the Mihailovich accident likely would not have occurred, in Berg's opinion. *Id.* at 4-5 ¶ 15.

Having reviewed Berg's three principal opinions, his deposition testimony, and his testimony on voir dire, the district court barred him from testifying as an expert but gave little explanation of its reasons for doing so. After noting the factors identified as pertinent in *Daubert*, the court simply stated that "it's clear that none of these factors are even remotely present to support [Berg's] purported analysis and methodology in reaching these three conclusions or opinions . . . ." Tr. 590-91.

When it will assist the trier of fact, Rule 702 permits a witness whose knowledge, skill, experience, training, or education has granted him expertise in a particular field to testify in the form of an opinion regarding one or more issues in the case, provided that "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. The district court functions as a gatekeeper with respect to testimony proffered under Rule 702 to ensure that the testimony is sufficiently reliable to qualify for admission. *See Kumho Tire Co.*, 526 U.S. at 147, 119 S. Ct. at 1174. The Supreme Court in *Daubert* identified five criteria that bear on that assessment, including whether the theoretical framework or technique underlying the witness's testimony (1) is subject to verification through testing, (2) whether it has been subjected to peer review and publication, (3) what its known or potential rate of error is, (4) whether there are standards controlling its application, and (5) whether it

is generally accepted within the relevant expert community. 509 U.S. at 593-94, 113 S. Ct. at 2796-97. "[T]his list is neither definitive nor exhaustive, but rather flexible to account for the various types of potentially appropriate expert testimony." *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 505 (7th Cir. 2003), citing *Kumho Tire Co.*, 526 U.S. at 141, 119 S. Ct. at 1171. We review de novo whether the district court correctly applied the *Daubert* framework, but assuming that it did so, we review the court's decision to admit or exclude testimony under Rule 702 for abuse of discretion. *E.g.*, *Deputy*, 345 F.3d at 505.

Review of the district court's decision to exclude Berg's testimony is hampered by the fact that the court simply stated without any explanation that Berg's methodology satisfied none of the criteria identified in *Daubert*. We do not doubt that the court was aware of the relevant considerations, in view of the fact that the court correctly recited each of the *Daubert* factors. But given that the *Daubert* framework is a flexible one that must be adapted to the particular circumstances of the case and the type of testimony being proffered, a court excluding expert testimony would do well to articulate with reasonable specificity the reasons why it believes the testimony is insufficiently reliable to qualify for admission under Rule 702. The lack of such explication makes it difficult to meaningfully review the lower court's decision. It is not immediately apparent here, for example, in what respects Berg's methodology departed from those of other civil engineers and why the analysis underlying his opinions is not reliable. Berg appears to have answered each of the questions posed to him on voir dire about his methods and assumptions and identified the data that he relied upon.

The admissibility of Berg's testimony therefore should be freshly addressed on remand. Although we express no opinion as to the appropriate outcome of that analysis,

we do make the following observations, which the district court should consider in evaluating the reliability of Berg's methodology.

First, we note that the human factors analysis that colored Berg's opinions vis-à-vis the Kedzie curve is not novel. It is a recognized analytical approach that is applied in a variety of contexts and may yield legitimate insights as to the hazards that particular products and situations (including roadways) may pose in light of predictable human behavioral patterns. *See* Kohlman, *supra*, *Using the Human Factors Expert in Civil Litigation*, 40 AM. JUR. TRIALS 629.

Second, a key assumption underlying Berg's evaluation of the curve is that drivers approaching the Kedzie curve from the north frequently would have done so at speeds in excess of thirty or thirty-five miles per hour and thus would have applied their brakes as they entered the curve in order to slow down. The district court appears to have had some doubt as to the legitimacy of this assumption. *See* Tr. 569-74. However, given that the stretch of Kedzie Avenue immediately to the north of the S-curve was more straight, wide, and recently paved than the curve itself, not to mention subject to a higher posted speed limit of forty-five miles per hour, common sense and experience suggests that southbound motorists frequently might have been traveling at speeds in excess of thirty-five miles per hour as they entered the curve. More to the point, the assumption that they were is consistent with the contemporaneous observations of both County engineers and Olympia Fields police. Recall that when Joseph Marsik, the County Highway Department's Chief Engineer of Maintenance, forwarded Frank Reno's memorandum about the possible problem with the curve to Chief Engineer of Transportation and Planning Arthur Kaindl, he wrote, inter alia, "It is our belief that the traffic is going too fast on the straight roadway, entering the curve, and then has

a problem negotiating the curve." Tr. 500. The proffer of Olympia Fields police officer Mark Fazzini likewise reveals a perception that motorists were approaching the curve at speeds substantially in excess of the advisory speed of thirty miles per hour. According to Mihailovich's counsel, Fazzini would have testified:

> [T]he police department literally set up speed traps at the highway to try to get drivers to slow down because they knew that cars coming from the north down into this curve had been traveling through a semirural area and that, as we know in this case, Kedzie Avenue just north of the curve, was resurfaced in 1981, '82 at Biden and this resurfacing went right up to the beginning of this north curve and the cars would come into the curve at a high rate of speed because of their assurance they were on a good, sound highway.

Tr. 253. Thus, the notion that southbound drivers often would be applying their brakes as they entered the curve, and among other things thereby creating a higher frictional demand on the roadway surface, does not, on its face, appear to be implausible. Whether frequent brake applications would have resulted in a polishing of the roadway surface, as Berg further hypothesized, is not a matter to which we can speak. Yet, there is ample evidence in the record that the surface of the curve was worn and smooth, with a tendency to become quite slick when wet. *E.g.*, Tr. 529, 661, 663; *see also* Tr. 252, 434-35.

Third, Berg's hypothesis that the slipperiness of the pavement caught motorists by surprise notwithstanding the posted warning signs appears, at the least, to be consistent with the facts. The data in the record do reflect an ongoing pattern of wet-pavement accidents that continued unabated notwithstanding the warning signs that were added or modified in 1984 (calling motorists' attention to the curve, advising a speed of thirty miles per hour

through the curve, and warning that the pavement was slippery when wet) and again in 1986 (reducing the advisory speed to twenty-five miles per hour). That pattern suggests that the signs, although sufficient in the abstract to alert motorists to a potential hazard (as Berg himself agreed), proved inadequate in practice to avert accidents.

Fourth and finally, there appears to be at least some evidentiary support, although weak, for Berg's opinion that the defects he identified in the roadway likely were at least partially responsible for the Mihailovich accident. That accident does fit the pattern revealed by the data in that it involved a southbound vehicle on wet pavement leaving the roadway (suggesting a loss of control) shortly after entering the curve. Moreover, although Mihailovich could not speak to what her husband was or was not doing as the driver of the vehicle in the crucial seconds before the accident, she did testify that he was driving at a "regular" rate of speed, keeping pace with other traffic, and that there was nothing unusual in the manner of his driving. It is a reasonable inference from her testimony and the pattern of ongoing accidents occurring at the curve under similar conditions that Mr. Mihailovich was not driving in a manner out of character with other traffic, and that he lost control of the vehicle due to the combination of the higher frictional demand his vehicle imposed as it entered the curve and the reduced skid resistance posed by the wet pavement. *See Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390-92 (6th Cir. 2000) (Cudahy, J.) (in order to qualify for admission, expert's opinion as to causation need not eliminate all other potential causes; expert's opinion as to probable cause admissible so long as it is based on facts and sound methodology); *see also* R. 123 at 9-10 (denying Laatsch's motion for summary judgment as to causation of Mihailovich accident).

We leave it up to the district court on remand to determine whether Berg's methodology reflects sufficient in-

tellectual and professional rigor to render his opinions trustworthy enough to reach the jury. The parties should be fully prepared to demonstrate to the court the respects in which Berg's methodology and conclusions do or do not conform to the evidence or to civil engineering standards.

III.

For the reasons set forth above, the judgment in favor of the defendants-appellees is VACATED, and the case is REMANDED for a new trial.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Date: March 5, 2004

Before
Hon. William J. Bauer, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

No. 01-3885

HELEN MIHAILOVICH, *Plaintiff-Appellant*	)	Appeal from the United States District Court for the Northern District of Illinois,
V.	)	
GARY LAATSCH and PAVALON, GIFFORD, LAATSCH & MARINO, law office, *Defendants-Appellees.*	)	No. 99 C 4780
	)	**John W. Darrah**, Judge

JUDGEMENT - WITH ORAL ARGUMENT

The judgment of the District Court is VACATED and the case is REMANDED. The above is in accordance with the decision of this court entered on this date. Costs are awarded to the appellant.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Date: May 5, 2004

Before
Hon. William J. Bauer, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

No. 01-3885

HELEN MIHAILOVICH, *Plaintiff-Appellant*	)	Appeal from the United States District Court for the Northern District of Illinois,
V.	)	
GARY LAATSCH and PAVALON, GIFFORD, LAATSCH & MARINO, law office, *Defendants-Appellees.*	)	No. 99 C 4780
	)	**John W. Darrah**, Judge

ORDER

On consideration of Petition for rehearing filed by defendants-appellees March 26, 2004, all of the judges on the original panel have voted to deny the petition. Accordingly, IT IS ORDERED that the petition for rehearing be, and the same hereby is DENIED.

United States District Court
Northern District of Illinois,
Eastern Division

HELEN MIHAILOVICH,	)	Appeal from the
Plaintiff-Appellant	)	United States
V.	)	District Court
	)	for the Northern
GARY LAATSCH and	)	District of Illinois,
PAVALON, GIFFORD,	)	
LAATSCH & MARINO,	)	No. 99 C 4780
law office,	)	
Defendants-Appellees.	)	**John W. Darrah**,
	)	Judge

MEMORANDUM OPINION AND ORDER

Plaintiff Helen Mihailovich ("Plaintiff' or "Mihailovich") has filed a one-count Complaint against Gary Laatsch and the Law Office ofPavalon, Gifford, Laatsch & Marino ("Defendants") for professional negligence. Defendantshave moved for summary judgment pursuant to FED.R.Clv.P. 56. For the reasons that follow, Defendants' Motion for Summary Judgment [50] is DENIED.

LEGAL STANDARD

Summary judgment is appropriate when there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146,150 (7th Cir. 1994). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . ." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Thus, although the moving party on a motion for summary

judgment is responsible for demonstrating to the Court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings,affidavits, depositions, answers to interrogatories, and admissions on file to demonstrate through specific evidence that there remains a genuine issue of material fact and show that a rational jury could return a verdict in the non-moving party's favor. *Celotex,* 477 U.S. at 322-27; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254-56 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 923 (7th Cir. 1994).

Disputed facts are material when they might affect the outcome of the suit. *First Ind. Bank v. Baker,* 957 F.2d 506, 507-08 (7th Cir. 1992). When reviewing a motion for summary judgment, a court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. *Anderson, 477* U.S. at 247-48; *Popovits v. Circuit City Stores, Inc.,* 185 F.3d 726, 731 (7th Cir. 1999). However, a metaphysical doubt will not suffice. *Matsushita, 475 U.S.* at 586. If the evidence is merely colorable or is not significantly probative or is no more than a scintilla, summary judgment may be granted. *Anderson,* 477 U.S. at 249-250.

BACKGROUND

The undisputed facts taken from the parties' Local Rule 56.1 (a) & (b) statements of material facts (referred to herein as "Pl.'s 56.1" and "Def.'s 56.1") and exhibits are as follows.

Plaintiff Helen Mihailovich was injured in a single-vehicle accident in Olympia Fields, Illinois on July 1, 1986. (Def.'s 56.111, Pl.'s 56.111). At the time of the accident, she was a passenger in a Chevy Nomad van being driven by her husband, Mihailio Mihailovich. (Def.'s 56.1 12).

In the Spring of 1987, Plaintiff engaged the law firm of Pavalon, Gifford, Laatsch & Marino to sue Cook County in connection with the July 1, 1986 accident. (Def.'s 56.116). Defendants were the second law firm retained by Plaintiff in connection with her contemplated action against Cook County. (Def.'s 56.1 ¶ 7). Before Plaintiff contacted Defendants, Mihailio Mihailovich died in a separate car accident and therefore could provide no account of the accident. (Def.'s 56.118).

On June 30,1987, Defendants filed a lawsuit against Cook County ("the underlying action") on Plaintiff's behalf. (Def.'s 56.1 ¶ 10). Attorney Gary Laatsch ("Laatsch") assumed primary responsibility for prosecution of Plaintiffs case. Cook County, in turn, filed a third-party claim against the Estate of Mihailio Mihailovich, asserting that negligent operation of the vehicle by the driver was the cause of the accident. (Def.'s 56.1 ¶ 11).

After filing the Complaint on Plaintiff's behalf, Defendants retained a private investigator, who located and obtained a statement from an eyewitness, John Penkala, who claimed that he observed Mihailovich speeding at the time of the accident. (Def's 56.1 ¶ 12, 13). In the course of discovery in the underlying case, Defendants propounded interrogatories to Cook County and received sworn responses. (Def.'s 56.1 ¶ 14). Plaintiffs discovery revealed that there had been over one-hundred collisions on the curve during the six years prior to Plaintiffs accident. (Pl.'s 56.1 ¶ 6).

During the entire time that Defendants represented Helen Mihailovich (from 1987 until 1998), they took only one deposition in the case. (P1.'s 56.1 ¶ 8). Defendants never asked anyone to inspect the road where the collision occurred. (Pl.'s 56.1 ¶ 8). Defendants did not inquire into the weather conditions at the time of any prior collisions. (Pl.'s 56.118). Defendants never learned that there was a

reduction in the rate of collisions after the roadway was fixed in 1988. (Pl.'s 56.1 ¶ 8). Defendants did not inquire into the driving experience of Mr. Penkala, how far he was from the Plaintiffs van when he made his observations, or how many vehicles, if any, were between the eyewitness and Plaintiff's van when the observations were made. (Pl.'s 56.1 ¶ 8). Defendants voluntarily dismissed the Mihailovich case against Cook County in 1992 because there was an impending trial date and they had not secured expert testimony to support the allegations. (Pl.'s 56.1 18). Defendants refiled the case in 1993. (Pl.'s 56.1 ¶ 8, 35).

Defendant Laatsch did not contact an expert in the case until April or May of 1992 when he spoke with William Berg. (Pl.'s 56.118). Berg is the only expert Laatsch consulted with on the case. (Pl.'s 56.1 ¶ 8). Laatsch never authorized Berg to visit the site, perform any follow-up analysis, or perform an engineering assessment of prevailing road conditions or traffic control devices at the site. (Pl.'s 56.119). Based on his analysis at the time, Berg was unable to determine to a reasonable degree of certainty whether there were defects in the subject roadway. (PL's 56.11 9).

Defendants discussed the difficulty of proving liability in the underlying case with Walter Mihailovich (Plaintiff's son) at various times, but they never sent letters to either Walter or Helen informing them that they no longer wanted to work on Plaintiff's case. (Def. Ex. 7 at 72-73, 106107). Walter Mihailovich wrote Defendants on February 28, 1997, directing them to transfer the file to the Law Offices of Edward Vrdolak. (Def.'s 56.1 ¶ 18). The Vrdolak firm eventually declined the representation. (Def.'s 56.1 ¶ 19).

The responsibility for seeking new counsel was given to Walter Mihailovich, Helen's son. (Def.'s 56.1 ¶ 20).

Walter conducted ongoing discussions with the law firm of Giaimo & Vreeburg from December 1997 through July 1998. (Def.'s 56.1 ¶ 21). This firm prepared *pro hac vice* submissions in connection with the underlying case and represented to other attorneys that it had been retained as counsel on Plaintiff's behalf, but they never entered an appearance or took any affirmative steps to prosecute the claim against Cook County on Plaintiffs behalf. (Def.'s 56.1*1* 22).

On December 16, 1997, the Circuit Court of Cook County struck the existing trial date and entered an order granting Defendants leave to file a Motion to Withdraw as Counsel. (Def. 's 56.1 123). Cook County had earlier filed a motion to bar Plaintiffs experts because of Defendants' failure to comply with discovery deadlines. (Pl.'s 56.1 ¶ 8). On January 27, 1998, the Circuit Court of Cook County granted Defendants' Motion to Withdraw, reset the trial date to July 22, 1998, and ordered Plaintiff to retain new attorneys within 45 days, on or before March 13, 1998. (Def.'s 56.1 125).

Walter Mihailovich then contacted the Chicago law firm of Ross & Hardies, which ultimately declined to represent Plaintiff on March 17, 1998. (Def. 's 56.1 ¶ 29). Walter Mihailovich eventually retained attorney Mark McKenna of the Chicago law firm of Chris Hurley & Associates in May, 1998. (Def.'s 56.1 ¶ 32). On June 2, 1998, McKenna filed a two-page motion requesting leave to enter an appearance and name fact and opinion witnesses. (Def.'s 56.1 ¶ 34). This motion also requested that the trial date of July 22, 1998 be moved. (Def.'s 56.1 ¶ 35). McKenna and counsel for Cook County appeared before Judge Murray on June 12, 1998. (Def.'s 56.1 ¶ 36).

Judge Murray granted Plaintiff leave to file the appearance and name fact and opinion witnesses but refused to move the trial date of July 22, 1998. (Def. 's 56.1 ¶ 39, Def.

Ex. 18 at 4). After McKenna was granted leave to name fact and opinion witnesses on Plaintiffs behalf, McKenna failed to do so. (Def.'s 56.1 ¶ 41). On July 18, 1998, the Circuit Court granted Cook County's motion to bar Plaintiff from presenting evidence at trial, over the objection of McKenna, since no witnesses had been named. (Def. Ex. 14). During the hearing, McKenna stated:

> . . . it would be impossible for me to get a case like this ready for trial in a month if the Court wouldn't grant the continuance of the trial date . . . but having the case for one month and with parts of this case filed all over the country with different experts, it's been impossible for me to get an expert and disclose him.

(Def.'s Ex. 14).

Neither McKenna nor Tom Paris, who entered a general appearance on behalf of Plaintiff, filed a motion to reconsider the Circuit Court's July 8,1998 ruling. (Def.'s 56.1 ¶ 58). Cook County filed a Motion for Summary Judgment in the underlying action on July 23, 1998. (Def's 56.1 ¶ 59). The Circuit Court of Cook County entered Summary Judgment in favor of Cook County on July 23, 1998. (Def.'s 56.1 ¶ 61).

Defendants have disclosed the opinion and report of Kenneth S. Baker, Director of the Accident Investigation Division of the Northwestern University Center for Public Safety, who has performed an analysis and several dynamic simulations of this accident. (Def.'s 56.1 ¶ 67). It is Baker's opinion that the curve on the road at issue could be negotiated safely by a motorist driving at or within the posted speed limit. (Def.'s 56.1 ¶ 68).

Plaintiff's expert William Berg has subsequently reviewed a number of documents and information in connection with the present case. (Pl.'s 56.1 ¶ 10). Based on his

additional work, Berg has concluded that there was a serious wet pavement problem at the location. (Pl.'s 56.1 ¶ 10). He believes that the single dominant factor in collisions occurring on the curve was that the southbound vehicle was on wet pavement. (Pl.'s 56.1 ¶ 11). He attributes the danger inherent in the curve to inadequate friction with the driving surface. (Pl.'s 56.1 ¶ 11). He concludes that the road had not been resurfaced since 1972 and that photographs of the roadway reveal that, at the time of the accident, there was substantial cracking in the surface in the immediate vicinity of where Plaintiff's car ran off the road. (Pl.'s 56.1 ¶ 10). He further concludes that alligator cracking is an indicator of substantial and serious pavement wear. (Pl.'s 56.1 ¶ 11).

Plaintiff has offered a memo composed by District Engineer Frank Reno before the curve was resurfaced in 1988, stating that the pavement on the curve was very smooth and could be contributing to the cause of the accidents. (Pl.'s 56.1 ¶ 18, 19). A simple resurfacing of the curve would have taken just a few months. (Pl.'s 56.1 ¶ 18).

Plaintiff has offered the statement of Robert Field, a Village of Olympia Fields Trustee, that, as the area around the curve has deteriorated over the years, the driving surface has become progressively slicker. (Pl.'s 56.1 ¶ 23).

Plaintiff has offered the statements of Mark Fazzini, the investigating police officer of the 1986 accident. (Pl.'s 56.1 ¶ 24). He has stated that it was raining at the time of the accident and that the roadway surface was slippery. (Pl.'s 56.1 ¶ 24). He has stated that almost all of the accidents at the curve have occurred during wet roadway conditions. (Pl.'s 56.1 ¶ 24).

Plaintiff has offered the statements of Fred Unger, the Police Chief in Olympia Fields at the time of the accident.

(Pl.'s 56.1 ¶ 25). He has stated that the surface of the road at the curve has been worn down to a fairly smooth surface over the years and that the constant wear of cars has made it shiny. (Pl.'s 56.1 ¶ 25). He has further stated that the thirty-five mile-per-hour speed limit was not a reasonable speed limit in inclement weather for drivers who were unfamiliar with the turn. (Pl.'s 56.1 ¶ 25).

DISCUSSION

To succeed on her claim, Plaintiff must establish the four elements of a legal malpractice claim: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages." *Lucey v. Law Offices of Pretzel & Stouffer, 301* III.App.3d 349, *353,* 703 N.E.2d 473, 476 (I11. App. Ct. 1998).

Defendants choose to attack the third element of Plaintiff's case in their Motion for Summary Judgment. To prevail against this Motion for Summary Judgment, Plaintiff must show that "but for" the attorney's negligence, the client would have successfully defended or prosecuted the underlying suit." *Bartholomew v. Crockett, 131* Ill.App.3d 456, 464, 475 N.E.2d 1035, 1040 (Ill. App. Ct. 1985). Defendants argue that: (1) Plaintiff cannot show causation because the attorney-client relationship ceased while Plaintiff still had a viable cause of action; (2) Plaintiff's underlying case lacks merit because she has failed to provide an expert that can substantiate that her accident was caused by the road; and (3) the Illinois Local Governmental Tort Immunity Act precludes Plaintiff's claim in her underlying case. (Def. Mot. 1.).

Proximate Causation: Viability of Plaintiff's Claim

An attorney's duty to a client ceases upon the attorney's discharge. If a cause of action is viable at the time an attorney is discharged, a plaintiff cannot succeed on a legal malpractice claim. *Land v. Greenwood, 133* Ill.App.3d 537, 540, 478 N.E.2d *1203,* 1205 (Ill. App. Ct. 1985). Defendants contend that they are entitled to summary judgment since Plaintiffs claim was viable when they ceased their representation.

Whether or not Plaintiffs claim was still viable is in dispute. A reasonable juror might conclude that Plaintiffs case was no longer viable when Defendants ceased their representation. Defendants' Motion to Withdraw was granted on January *27,* 1998. (Def.'s 56.1125). At that time, Plaintiffs case was eleven years old, and Defendants had not named an expert witness in the case. At that time, Cook County had already filed a motion to bar Plaintiff from presenting evidence because of Defendants' delay in naming witnesses.

Although Defendants might argue that Plaintiff's delay in securing counsel may have destroyed the viability of the case, a reasonable juror might conclude that Defendants' failure to prosecute the case for eleven years was the proximate cause of Plaintiffs inability to secure counsel.

Furthermore, the case relied upon by Defendants, *Land v. Greenwood,* 133 Il1.App.3d 537, 540,478 N.E.2d 1203, 1205 (Ill. App. Ct. 1985), is distinguishable in a very significant way. In that case, the Illinois Appellate Court found that the case was still viable since Plaintiff could have taken a voluntary non-suit and re-filed at a later date. This option was not available to Mihailovich in 1998 because Defendants had already taken one voluntary non-suit in 1993.

Proximate Causation: Merits of Plaintrs Underlying Claim

Defendants further allege they are entitled to summary judgment because Plaintiff's expert has not concluded that the condition of the curve caused the accident.

A plaintiff in a legal malpractice case "is essentially required to prove a case-within-a-case; specifically, establishing *a prima facie* . . . case and then proving it in order to prove the legal malpractice case." *Sheppard v. Krol, 218* Ill.App.3d 254, 256, *578* N.E.2d 212, 214 (Ill. App. Ct. 1991). "The defendant's conduct is a factual cause of the plaintiff's injury if the conduct was `a material element and a substantial factor in bringing about the injury.' Where reasonable minds can differ on the question, a jury must decide." *Jefferson v. City of Chicago,* 269 Ill.App.3d 672, 675, 646 N.E.2d 1305, 1308 (Ill. App. Ct. 1995)(citation omitted).

Plaintiff has met her burden of showing that Cook County's failure to maintain the curve was "a material element and a substantial factor in bringing about the injury." Plaintiffs expert, Berg, has concluded that there was a serious wet pavement problem at the location as a result of Cook County's failure to maintain the pavement at the curve. (Pl.'s 56.1 ¶ 10). He believes the single dominant factor in the accidents at the corner was the condition of the pavement when it was wet. (Pl.'s 56.1 ¶ 11). He concludes that the road had not been resurfaced at least since 1972 and that photographs of the roadway reveal that, at the time of the accident, there was substantial cracking in the surface in the immediate vicinity of where Plaintiff's car ran off the road and that this cracking is an indicator of substantial and serious pavement wear. (Pl.'s 56.1 ¶ 11). Plaintiff has further offered the statements of Mark Fazzini, the investigating police

officer of the 1986 accident. (Pl.'s 56.1 ¶ 24). He has stated that it was raining at the time of the accident and that the roadway surface was slippery. (Pl.'s 56.1 ¶ 24).

Based on the evidence, whether or not Cook County's failure to maintain the curve caused the accident is an issue on which reasonable minds may disagree. It is therefore a question for the jury.

Proximate Causation: Immunity of Cook County

Defendants further argue that they are entitled to summary judgment since Plaintiffs underlying claim was barred by the Illinois Local Government Tort Immunity Act. This argument is not persuasive. Although local governments are immune for failure to undertake public improvements,* Plaintiff's case is clearly based on Cook County's alleged failure to maintain the pavement on the curve at issue. A municipality does have a "general duty to maintain its property in a reasonably safe manner. . ." *Herman v. Township,* 284 III.App. 3d 53, 58,671 N.E.2d 1141, 1145 (III. App. Ct. 1996).

In reaching his conclusions, Plaintiff's expert Berg considered the dilapidated condition of the road previous to resurfacing. Furthermore, Plaintiff has offered the testimony of Robert Field that the dangerously slick condition of the curve was the result of deterioration over time. Defendants' Motion for Summary Judgment is therefore denied.

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* *See e.g., West v. Kirkham, 588* N.E.2d 1104, 110 (111. App. Ct. 1992)("no liability could be imposed for the failure to undertake the improvements in the first place.")

CONCLUSION

For the reasons stated herein, Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

/s/ John W. Darrah, Judge
United States District Court

Date: August 22, 2001